TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 103.

JANE S. ROBISON, INDIVIDUALLY AND AS EXECUTRIX OF ROBERT I. ROBISON, DECEASED, APPELLANT,

vs.

THE FEMALE ORPHAN ASYLUM OF PORTLAND, THE PORTLAND WIDOWS' WOOD SOCIETY AND THE HOME FOR AGED WOMEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED OCTOBER 15, 1884.

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a *Pleadings and Proofs.*

Circuit Court of the United States, District of Maine. In Equity.

JANE S. ROBISON, Complainant,

v.

THE FEMALE ORPHAN ASYLUM OF PORTLAND *et als.*, Respondents.

Willard Bartlett, Thomas & Bird, for complainant; J. & E. M. Rand, for respondents.

aa Circuit Court of the United States, District of Maine. In Equity.

JANE S. ROBISON

vs.

THE FEMALE ORPHAN ASYLUM, THE WIDOWS' WOOD SOCIETY, AND THE HOME FOR AGED WOMEN.

To the Honorable Horace Gray, justice of the United States Supreme Court:

And now comes said Jane S. Robison and claims an appeal to the Supreme Court of the United States from the final decree in the above cause, and prays that this her appeal may be allowed and that a transcript of the proceedings and record in the cause, duly authenticated, may be sent to the said Supreme Court and citation issue to said Female Orphan Asylum, The Widows' Wood Society, and The Home for Aged Women, and that she may be allowed to deposit in the registry of the court such sum of money as may seem proper to the court as security, that she shall prosecute her appeal to effect and answer all costs if she fail to make her appeal good.

Portland, Sep. 9, 1884.

JANE S. ROBISON,
By GEORGE E. BIRD,
Her Attorney.

Boston, September 10, 1884.
Allowed:

HORACE GRAY.

b Circuit Court of the United States, District of Maine.

JANE S. ROBINSON *v.* THE FEMALE ORPHAN ASYLUM *et al.*

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, hereby certify that the complainant in the above-entitled cause, on the ninth day of September, A. D. 1884, deposited in the registry of this court the sum of three hundred dollars ($300) as security for the purposes stated in complainant's foregoing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 6th day of October, A. D. 1884.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

c The United States of America to the Female Orphan Asylum of Portland, a citizen of the State of Maine, the Portland Widows' Wood Society, also of the city of Portland and a citizen of the State of Maine, and the Home for Aged Women, likewise of the city of Portland and a citizen of the State of Maine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein Jane S. Robison, of the city of New York and a citizen of the State of New York, suing individually and as executrix under the last will and testament of Robert I. Robison, deceased, is appellant, and you are defendants, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal is mentioned, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, associate justice of the Supreme Court of the United States, this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

HORACE GRAY,
Justice of the Supreme Court of the United States.

d On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

UNITED STATES OF AMERICA, *Maine District*, } ss:

SEPTEMBER 13, A. D. 1884.

I have this day served the within precept upon the within-named defendants, The Female Orphan Asylum, of Portland, by delivering in hand to Abby S. Barrett, secretary & clerk of said asylum, an attested copy of same; upon The Portland Widows' Wood Society, by delivering in hand to Samuel Rolfe, treasurer of said society, an attested copy of same; upon The Home for Aged Women, by delivering in hand to Julia Greely, treasurer of said Home for Aged Women, an attested copy of the same.

H. D. MARBLE,
Dep. U. S. Marshal, District of Maine.

Service, 3	6 00
Travel, 3	18
	$6 18

1 *Transcript of Record.*

MAINE DISTRICT, *ss:*

First Circuit.

At a term of the circuit court of the United States for the first circuit begun and held at Portland, within and for the district of Maine, on Wednesday, the twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Before Hon. Horace Gray, circuit justice; Hon. Nathan Webb, district judge.

JANE S. ROBISON
v.
THE FEMALE ORPHAN ASYLUM OF PORTLAND *et als.* } No. 288.

On the 29th day of December, in the year of our Lord eighteen hundred and eighty-one, Thomas & Bird, solicitors, filed the following bill of complaint:

To the honorable the judges of the circuit court of the United States within and for the district of Maine, sitting in equity:

Jane S. Robison, of the city of New York and a citizen of the State of New York, suing individually and as executrix under the last will and testament of Robert I. Robison, deceased, brings this her bill against the Female Orphan Asylum of Portland, a citizen of the State of Maine; the Portland Widows' Wood Society, also of the city of Portland and a citizen of the State of Maine, and the Home for Aged Women, likewise of the city of Portland and a citizen

2 of the State of Maine; and thereupon your oratrix complains and says that she is and at all the times hereinafter mentioned was a citizen of the State of New York, and that each of the above-named defendants is and at all the times hereinafter mentioned was a citizen of the State of Maine.

And your oratrix further shows that the defendant, The Female Orphan Asylum of Portland, is a corporation incorporated under and by virtue of an act of the Legislature of the State of Maine approved by the Governor on the 18th day of February, 1828; that the defendant, The Portland Widows' Wood Society, is a corporation incorporated under and by virtue of an act of the Legislature of the State of Maine approved on the 30th day of May, 1850, and that the defendant, The Home for Aged Women, is also a corporation which was established in the city of Portland prior to the first day of March, 1856, under the general statute of the State of Maine, authorizing the incorporation of charitable and benevolent societies by the name of the Association for the Relief of Aged and Indigent Women, which name it retained until the eleventh day of May, 1870, when, by an act of the Legislature of the State of Maine approved on that day, it was authorized to take and use thereafter its present name of the Home for Aged Women.

And your oratrix further shows that she is the widow of the late Robert I. Robison, formerly of Portland, in the State of Maine, but

at the time of his death a citizen of the State of New York and a resident of Brooklyn, in the State of New York, who departed this life at that city on the 13th day of June, 1878, and that the said Robert I. Robison during his lifetime, to wit, on the 31st day of October, 1862, duly made and executed his last will and testament in the words and figures following—that is to say:

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and pub-
3 lish this my last will and testament. And, first, my will is that my executors see that my body be buried in a decent and proper manner in the family vault in the Eastern Cemetery in the city of Portland aforesaid. Secondly, I will all my just debts be paid in full, and from the balance I will that with whatever property may be standing in my wife's, Jane S. Robison's, name, at the time of my death, that my executors make up said amount to the sum of eight thousand and five hundred dollars, it being the amount, or thereabouts, which she received from her father and mother estates, it being my will that the principal shall be kept good to her and her heirs, but not the interest. This is to be in full for all claims she may have on my estate arising out of the use of her property. Thirdly, I further will that she may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. Fourthly, it is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the Widows' Wood Society, and one-third of the income to the Home for Aged Indigent Women, all of the city of Portland and State of Maine. Lastly, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament.

"In testimony whereof I have hereunto subscribed my name and affixed my seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

"(S'd) ROBERT I. ROBISON. [L. S.]

4 "Signed, sealed, and declared by the said Robert Ilsley Robison to be his last will and testament in the presence of us, who, at his request and in his presence, have subscribed our names as witnesses hereto.

"CHAS. H. ADAMS.
"B. F. HARRIS.
"JASON BERRY."

And your oratrix further shows that the said last will and testament was duly admitted to probate in the surrogate's court of Kings county, in the State of New York, and duly recorded by the said

surrogate on the 27th day of December, 1878; that letters testamentary thereon were on the same day issued and granted by the said surrogate to your oratrix; that she duly qualified as executrix under the said last will and testament and assumed the execution of her trust thereunder, but she is informed and verily believes that John Rand, who is therein nominated as executor, has never qualified as such, and by an order duly made by the surrogate's court of Kings county, in the State of New York, on the 25th day of March, 1879, he was declared to have renounced the appointment; and she is further informed and verily believes that the said last will and testament was heretofore, to wit, on or about the third Tuesday of July, A. D. 1879, duly filed and recorded in the probate court of the county of Cumberland, in the State of Maine.

And your oratrix further shows that the said Robert I. Robison, the testator aforesaid, was seized in his lifetime and at the time of his death of certain real estate situate, lying, and being in the city of Portland, in the said county of Cumberland and State of Maine, having a present value, as she is informed and verily believes, of about eight thousand dollars, and was also the owner and possessor of a considerable amount of personal property at the time of his death, mostly situated in the State of New York, and worth, as she is informed and verily believes, upwards of fifteen thousand dollars.

5 And your oratrix further shows that she was the wife of the said Robert I. Robison, deceased, and is the person mentioned and described as Jane S. Robison, his wife, in the last will and testament aforesaid; that Ann Smith and Eleonora Cummings Robison, who are mentioned in the fourth subdivision thereof, both died before the said testator; and your oratrix is informed and verily believes that the Home for Aged and Indigent Women mentioned therein is the defendant corporation, now known and known since the 11th day of May, 1870, as the Home for Aged Women, but whose legal designation at the time of the execution of the said last will and testament was the Association for the Relief of Aged and Indigent Women, and that the Portland Female Orphan Asylum and the Widows' Wood Society, also mentioned therein, are the other defendant corporations, respectively.

And your oratrix has been advised and so charges that the fourth subdivision of the said last will and testament of her late husband is inoperative and was inoperative at the time the said last will and testament took effect, and that the defendant corporations have acquired no rights or interests in the estate of the said testator under or by virtue of the said last will and testament, and that under and by virtue of the second and third subdivisions thereof your oratrix has become individually entitled to the absolute possession and ownership of all the said testator's estate, with absolute power of disposition over the same, and not merely to a life interest in his property.

But, notwithstanding the said rights of your oratrix, she is informed and verily believes and so charges that the defendants and each of them insist that the fourth subdivision of the said last will

and testament was and is operative, and claim a vested remainder in the entire aforesaid estate of the said Robert I. Robison, deceased, and pretend that your oratrix is entitled only to a life estate in his property, and contend that the trust reposed in her as executrix requires that after the payment of the specific bequest of eight
6 thousand five hundred dollars made in the second subdivision of her said husband's will she shall pay to herself, as an individual, by virtue of the devises and bequests in the said will contained, only the income derived from said property.

And your oratrix had well hoped that no disputes would have arisen touching the said last will and testament, or the construction thereof, or the trust reposed in her as executrix thereunder, or her rights individually as devisee and legatee under the terms thereof, but that the defendants would have assented to the construction of the said last will and testament, which your oratrix has been advised is correct as aforesaid, and to the execution of her trust as executrix in accordance therewith, and would have complied with the reasonable request of your oratrix so to do, as in equity and good conscience they ought to have done.

But now so it is, may it please your honors, that the said The Female Orphan Asylum of Portland, The Portland Widows' Wood Society, and The Home for Aged Women, combining and confederating together, refuse to comply with such request, and at times make the several claims, pretences, and contentions already hereinbefore set forth in reference to the construction of the said last will and testament, and the execution of the trust reposed in your oratrix as executrix thereunder, whereas your oratrix, as aforesaid, charges the contrary of the said several claims, pretences, and contentions to be in accordance with the correct construction of the said last will and testament and a correct declaration of the trusts reposed in her as executrix.

In consideration whereof, and forasmuch as your oratrix is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that justice may be done as between the defendants and your oratrix, she prays that the said last will and testament of Robert I. Robison, deceased, may be construed
7 by this honorable court; that the trusts reposed by the said last will and testament in your oratrix as executrix be declared; that the rights of the defendants and your oratrix in the estate of the said testator be determined, and that your oratrix have such further and other relief in the premises as the nature of her case shall require and to your honors shall seem meet.

May it please your honors to grant unto your oratrix the most gracious writ of subpœna of the United States of America, to be directed to the said The Female Orphan Asylum of Portland, the Portland Widows' Wood Society, and the Home for Aged Women, thereby commanding them and every of them, at a certain day, and under a certain pain therein to be specified, to be and appear before your honors in this honorable court, and then and there to answer all and

singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet.

And your oratrix shall ever pray.

THOMAS & BIRD,
Solicitors for Complainant.

WILLARD BARTLETT,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Jane S. Robison, being duly sworn, deposeth and saith that she is the complainant in the foregoing bill named, and has read the same and knows the contents thereof; that the said bill is true of her own knowledge except as to those matters which are therein stated to be on her information and belief, and as to those she believes it to be true.

JANE S. ROBISON.

8 Sworn to before me this 17th day of December, 1881.
[L. S.] JOSEPH KUNZMANN,
Notary Public, N. Y. Co.

THOMAS & BIRD,
Solicitors for Complainant.

Whereupon a subpœna in chancery issued to each of the respondents, returnable on the first Monday of February next ensuing, and the several subpœnas were returned duly executed. Said cause was entered in court, and J. & E. M. Rand, solicitors, having duly entered their appearance for the Female Orphan Asylum of Portland, and for the Portland Widows' Wood Society, respondents, thereafterwards, to wit, on the sixth day of March next ensuing, filed the following answer of the Female Orphan Asylum:

The Answer of The Female Orphan Asylum of Portland, One of the Defendants, to the Bill of Complaint of Jane S. Robison, Complainant.

This defendant, reserving to itself all benefit of exception to the many errors and insufficiencies in said bill of complaint contained, for answer to so much thereof as this defendant is advised requires an answer, answering, says that it admits that this defendant is a duly created and organized corporation as alleged in said bill, and is the Portland Female Orphan Asylum named in the fourth clause of the will hereinafter named.

That it has been informed and believes that complainant is the widow of Robert I. Robison, of Portland, in the State of Maine, and is the person mentioned and described in the last
9 will and testament hereinafter named as Jane S. Robison; that said Robert I. Robison died at or about the time alleged in said bill, leaving, duly made and executed, a last will and testament, as set forth in said bill; that said last will and testament has been admitted to probate in the surrogate court of Kings county in

the State of New York, and that letters testamentary thereon have been issued to the complainant, as alleged in said bill.

And this defendant has no knowledge or information whether said last will and testament has ever been filed and recorded in the probate court of the county of Cumberland in the State of Maine, and has no knowledge or information as to what property, real or personal (if any), the said Robert I. Robison was seized or possessed of at the time of his death.

This defendant has no knowledge or information whether Ann Smith and Eleanora Cummings Robison, mentioned in the fourth clause of said will, died before said testator.

And this defendant has been advised and denies that the fourth clause in said last will and testament of said Robert I. Robison is now or was at the time said will took effect in any respect inoperative, and has been advised and asserts that the same is operative, and that this defendant did thereby acquire the right and interests in the estate of said testator described, devised, and bequeathed therein to this defendant, to wit, the rights to one-third part of the income of the estate of said testator from and after the death of said Jane S. Robison and of said Ann Smith and Eleanora Cummings Robison.

And this defendant denies all the pretended claims of said complainant asserted in said bill to the absolute possession and ownership of all the said testator's estate, with absolute power of disposition over the same.

And this defendant submits its rights in the premises to this honorable court.

FEMALE ORPHAN ASYLUM
OF PORTLAND,
By SARAH B. FARMER, *President.*

J. & E. M. RAND,
Solicitors for Defendant.

10 And on the same day the following answer of the Widows' Wood Society:

The Answer of The Portland Widows' Wood Society, One of the Defendants, to the Bill of Complaint of Jane S. Robison, Complainant.

This defendant, reserving to itself all benefit of exception to the many errors and insufficiencies in said bill of complaint contained, for answer to so much thereof as this defendant is advised requires an answer, answering, says that it admits that this defendant is a duly created and organized corporation, as alleged in said bill, and is the Widows' Wood Society named in the fourth clause of the will hereinafter named.

That it has been informed and believes that complainant is the widow of Robert I. Robison, of Portland, in the State of Maine, and is the person mentioned and described in the last will and testament hereinafter named as Jane S. Robison; that said Robert I. Robison died at or about the time alleged in said bill, leaving, duly made

and executed, a last will and testament, as set forth in said bill; that said last will and testament has been admitted to probate in the surrogate court of Kings county, in the State of New York, and that letters testamentary thereon have been issued to the complainant, as is alleged in said bill.

And this defendant has no knowledge or information whether said last will and testament has ever been filed and recorded in the probate court of the county of Cumberland, in the State of Maine, and has no knowledge or information as to what property, real or personal (if any), the said Robert I. Robison was seized or possessed of at the time of his death.

This defendant has no knowledge or information whether Ann Smith and Eleanora Cummings Robison, mentioned in the fourth clause of said will, died before said testator.

And this defendant has been advised and denies that the
11 fourth clause in said last will and testament of said Robert I. Robison is now or was at the time said will took effect in any respect inoperative, and has been advised and asserts that the same is operative, and that this defendant did thereby acquire the rights and interests in the estate of said testator described, devised, and bequeathed therein to this defendant, to wit, the right to one-third part of the income of the estate of said testator from and after the death of said Jane S. Robison and of said Ann Smith and Eleanora Cummings Robison.

And this defendant denies all the pretended claims of said complainant asserted in said bill to the absolute possession and ownership of all the said testator's estate, with absolute power of disposition over the same.

And this defendant submits its rights in the premises to this honorable court.

PORTLAND WIDOWS' WOOD SOCIETY,
By SAMUEL W. LARRABEE, *President.*

J. & E. M. RAND,
Solicitors for Defendant.

And on the third day of April next ensuing is filed the following replication:

The Replication of Jane S. Robison, Complainant, to the Several Answers of The Portland Widows' Wood Society and Female Orphan Asylum of Portland, Two of the Defendants to said Complainant's Bill.

This repliant, saving and reserving to herself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto, saith that she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are untrue, uncertain, and insufficient in the law to be replied
12 unto by this repliant without this, that any other matter or thing whatsoever in the said answers contained material or effectual in law to be replied unto, confessed and avoided, traversed

or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she hath already prayed.

Said cause is continued to April term, A. D. eighteen hundred and eighty-two; and on the first day of May the complainant moves that said bill be taken *pro confesso* as to the Home for Aged Women, on the ground that said respondent, though duly served with a subpœna to appear and answer to said cause, has not appeared, by its attorney or otherwise, to make its defense to said bill; and now, to wit, July 3, 1882, on motion of the complainant, publication of the testimony in this cause is ordered as follows:

Evidence for Complainant.

Deposition of Jane S. Robson.

Interrogatories to be administered to Jane S. Robison, of the city, county, and State of New York, a witness to be produced, sworn, and examined under and by virtue of the annexed commission, before Southard Hoffman, Esq., the commissioner therein named, in a certain cause depending in the circuit court of the United States for the district of Maine, wherein Jane S. Robison is complainant and The Female Orphan Asylum of Portland and others are respondents, on the part of the said complainant.

13 First interrogatory. What is your name, age, and residence, and are you the complainant in said suit?

Second interrogatory. The late Robert I. Robison, testator mentioned in the bill of complaint and answer herein, copies of which have been shown to you, was seized of what real estate at his death, where was it situated, and what is its present value?

Third interrogatory. The said Robert I. Robison, at the time of his death, was possessed of personal property to what amount, where was it situated, and of what did it consist?

Fourth interrogatory. Do you know Mrs. Ann Smith, wife of Jacob Smith, of Bath, and sister to the said Robert I. Robison? Do you know Mrs. Eleanora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West?

Fifth interrogatory. If you have answered "yes" to the fourth interrogatory, state if either or both of the persons therein named are deceased; and, if so, the date of their death.

Sixth interrogatory. Do you know of any other matter or thing touching the matters in question that may tend to the benefit or advantage of the said plaintiff? If so, declare the same fully and at large, as if you had been particularly interrogated thereto.

A true copy of the original interrogatories.
Attest: A. H. DAVIS, *Clerk.*

To the first interrogatory she saith: My name is Jane S. Robison; age, over sixty years; my residence is Brooklyn, N. Y. I am
14 the complainant in the suit of Jane S. Robison and The Female Orphan Asylum of Portland and others, respondents.

To the second interrogatory she saith: The late Robert I. Robison was seized at his death of house and lot on Lincoln street, Portland, Maine; a lot on the corner of Lincoln and Boyd streets, Portland, Maine; a lot on Fourth street, called the Tunsmore lot, and a lot on Franklin street, all in Portland, Maine. This, I think, is all the real estate interrogated as to.

I estimate the present value of all the above-described property at eight thousand dollars.

To the third interrogatory she saith: The personal property possessed by Robert I. Robison at the time of his death amounted to fifteen thousand and upwards, mostly situated in New York city, and consisted of bonds, shares of stock, promissory notes, and accounts.

What was not situated in New York was in Portland, Maine—I do not remember the character—and in San Francisco, the value of which I cannot give, but the bulk of the personal property was in New York city.

To the fourth interrogatory she saith: I know Mrs. Ann Smith, wife of Jacob Smith, of Bath, and sister of the said Robert I. Robison. I know Mrs. Eleanora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West.

To the fifth interrogatory she saith: Both the persons named in the answer to the fourth interrogatory are deceased. Mrs. Ann Smith died September 18, 1876. Mrs. Eleanora Cummings Robison died September 29, 1863.

15 To the sixth interrogatory she saith: I remember no other matter or thing touching the matters in question that may tend to the benefit or advantage of the said plaintiff.

JANE S. ROBISON.

16 & 17 And on the 4th day of September, A. D. 1882, the Home for Aged Women appears and asks leave to file an answer, which is granted—Webb, J.—on terms that no costs prior to this time be allowed, and that this respondent consent to the order setting the cause down for hearing on September 26th upon the evidence already taken and the pleadings; and on said 4th day of September is filed the following answer of Home for Aged Women.

Answer of The Home for Aged Women, One of the Defendants, to the Bill of Complaint of Jane S. Robison, Complainant.

This defendant, for answer to so much of said bill as it is advised requires an answer, says that this defendant is a duly organized corporation, as alleged in said bill.

That this defendant is informed and believes that the complainant is the widow of Robert I. Robison, of Portland, in the State of Maine, and is the person named in the will hereinafter described as Jane S. Robison; that said Robert I. Robison died at about the time alleged in said bill, leaving duly executed a last will and testament, as set forth in said bill; that the same has been admitted to probate in the surrogate court of Kings county, in the State of New York,

and that letters testamentary thereon have been issued to the complainant, as alleged in said bill.

And this defendant has no knowledge as to what property the said Robert I. Robison was possessed of at the time of his death, or whether Ann Smith and Eleanora Cummings Robison, named in said bill, died before the testator.

And this defendant denies that the fourth clause in said last will is now, or was at the time said will took effect, in any respect inoperative; and it has been advised and asserts that the same is
18 operative, and that this defendant did thereby acquire the rights and interests in the estate of said testator described therein and devised and bequeathed to this defendant.

And this defendant denies all the pretended claims of said complainant to the absolute ownership of all the testator's estate, with power to dispose of the same.

And this defendant prays that said bill be dismissed with costs.

HOME FOR AGED WOMEN,
By HELEN A. GILMAN, *President.*

EDWARD H. DAVEIS,
Solicitor for Defendant.

And on the 6th day of said September is filed the following replication to answer of Home for Aged Women:

The Replication of Jane S. Robison, Complainant, to the Answer of The Home for Aged Women, One of the Defendants, to said Complainant's Bill.

This repliant, saving and reserving to herself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is untrue, uncertain, and insufficient in the law to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she hath already prayed.

JANE S. ROBISON,
By THOMAS & BIRD,
Her Solicitors.

19 And on said 26th day of September, A. D. 1882, said cause came on to be heard before Gray and Webb, JJ., and it was ordered that said cause be opened to allow evidence on domicil of testator; which evidence was subsequently filed as follows:

Evidence for Complainant.

Notice to respondents' solicitors.

GENTLEMEN: You will please take notice that by an order made in said cause by Southard Hoffman, Esq., the examiner specially

appointed by this court, the examination of Jane S. Robison, a witness on the part of the complainant herein, will take place before said examiner, at room No. 63, in the new appraisers' building, Sansome and Washington streets, San Francisco, California, on the sixth day of December, 1882, at eleven o'clock in the forenoon, and proceed as said examiner may direct.

You are invited to attend and cross-examine said witness without further notice.

Dated Portland, November 18, 1882.

Yours, &c., THOMAS & BIRD,
Solicitors for Complainant.

To Messrs. J. & E. M. Rand, solicitors for defendants.

UNITED STATES OF AMERICA, *Maine District:*

Personally appeared W. W. Thomas, Jr., and made oath that on November 20, 1882, he served the notice of which the above is a true copy on J. & E. M. Rand, solicitors as above, by giving said notice to John Rand in hand, and also served said notice on E. H. Davois, Esq., solicitor for Home for Aged Indigent Women, on November 21, 1882, by reading.

Before me this 20th day of February, A. D. 1883.

[L. S.] A. H. DAVIS, *Clerk.*

Deposition of Jane S. Robison.

In the Circuit Court of the United States, First Circuit and District of Maine.

JANE S. ROBISON, Complainant,
vs.
THE FEMALE ORPHAN ASYLUM OF PORTLAND *et als.*, Respondents.

Be it remembered that on this 6th day of December, 1882, at my office, in the city and county of San Francisco, State of California, personally appeared before me, Southard Hoffman, a commissioner duly appointed by the circuit court of the United States for the first circuit and district of Maine to take orally the testimony of Jane S. Robison, a witness on behalf of the complainant in the above-entitled cause, the said Jane S. Robison.

M. B. Blake, Esq., appeared as counsel for complainant, and no appearance being made on behalf of respondents.

And the said witness, having been by me first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as follows—that is to say:

Examination-in-chief of JANE S. ROBISON:

I am the complainant in this case.

I was the wife of Robert I. Robison, whose will is mentioned in the bill of complaint.

I am still his widow.

I was married to him at Newport, Rhode Island, in 1841. He left no surviving children.

On October 31, 1862, the date of the execution of the will mentioned, he was living at the Preble House, Portland, Maine. Prior to that date his residence had been at Portland. We kept house in Portland from 1841 until the spring of 1861. We then broke up housekeeping, sold our furniture, leased our house to the tenant who subsequently purchased it. The reason for breaking up housekeeping was the death of our only daughter and that my health was so miserable that I needed a decided change.

Mr. Robison was at this time in active business. His business was that of an oil manufacturer, with the factory in Exchange street, Portland. He continued in business, but was mainly employed in reducing and settling old business. He entirely discontinued active business in the spring of 1863. His reason for winding up his business was that all the associations in Portland were sad and gloomy to him; that all that were near and dear to him had either died or left Portland, and that as our children were not living he had no further desire to make money; and as the lease of his business place was soon to expire he would then go out of business, and we could go where we pleased and choose a happier home, but that he had no longer any attractions to Portland. I never had been well in Portland, which was an additional reason for his wishing to leave there.

Between the spring of 1861—at which time we broke up housekeeping—until the date of the execution of the will, Oct. 31, 1862, we were living at the Preble House, Portland, with occasional visits elsewhere. We remained at the Preble House until the spring of 1863. After the spring of 1863 we went to Philadelphia and decided to make it our home.

22

Our intention to leave Portland as a home and the reasons therefor, as given above, were generally understood by our friends. We made Philadelphia our home from the spring of 1863 until the fall of 1871. With the exception of our summer visits we made Philadelphia our home for that period of time, and lived there continuously.

On my return from a six months' visit to my brother in California my husband proposed our changing our residence to Brooklyn, New York, on the ground that most of my relatives and many of his resided there, and, as we were getting advanced in years, it would be much pleasanter for us to be with them. My health had greatly improved in Philadelphia, and my trip to California had so entirely restored my health that I felt able to take up my residence in Brooklyn. In the month of November, 1871, we moved to Brooklyn, N. Y., intending to make it our permanent and only home.

We made Brooklyn our home until the time of my husband's death, June 13, 1878, at which time he was, of course, a resident of Brooklyn, New York, and there died.

From the time of our leaving Portland, in 1863, we had no intention of ever returning to it for the purpose of making it our home,

nor had we any desire so to do, as our visits there were very annoying to my husband.

From the spring of 1863, when we left Portland, I do not think that our visits to Portland aggregated six months.

In making our usual summer trips to North Conway, New Hampshire, we usually stopped at Portland, as it was on our way and to enable Mr. Robison to look after his real estate, which was a great trouble to him. His aim was to sell it and to get rid of it as fast as possible. His desire was to get rid of his property in Portland, and to have no interest there whatever.

23 When we left Portland in 1863 we took away all the personal property which we could possibly remove. Nothing was left but some pictures, a telescope, some books, and the accruing rents, amounting in all to not probably more than one hundred dollars. We had no use for the pictures, books, &c., and most of them we subsequently gave away.

I don't think that my husband had a single correspondent in Portland except his real estate agent. After the spring of 1863 my husband was engaged in no business in Portland except to look after his real estate.

After we moved to Brooklyn we generally spent the greater part of the year there, usually only going away in the heat of the summer. We made quite a long visit to California, going there in the autumn of 1873, leaving our principal belongings in Brooklyn, and returning there as to our home.

When we moved from Philadelphia we took away all our belongings and placed them in our home in Brooklyn, N. Y. We did not keep house subsequent to our leaving Portland; both in Philadelphia and Brooklyn we boarded. We were not in Brooklyn as guests, but always as boarders, paying board. Whilst we were living in Philadelphia we made several visits to Brooklyn, spending two winters there and several springs, making many friends and acquaintances there outside of our relatives, and becoming greatly attached to the place and greatly preferring it to Philadelphia. When we left Philadelphia we left with no expectation of ever returning there, unless it might be for a transient visit. In point of fact, after leaving Philadelphia as a home we never did make but three short visits there—no visit of greater duration than one or two weeks.

JANE S. ROBISON.

Be it further remembered that the foregoing deposition of Jane S. Robison was then and there reduced to writing in the presence of the deponent and of her said counsel, and then carefully read

24 to the said deponent, and by the said deponent subscribed in my presence and in the presence of her said counsel after having been so reduced to writing and read to her.

Given under my hand and seal, at the city and county of San Francisco, State of California, this 6th day of December, 1882, and of the Independence of the United States the one hundred and seventh.

[L. S.] SOUTHARD HOFFMAN,

Clerk U. S. District Court, District of California, Commissioner.

Notice to Respondents' Solicitors.

Circuit Court of the United States for the District of Maine.

JANE S. ROBISON, Complainant,

against

THE FEMALE ORPHAN ASYLUM OF PORTLAND and Others, Respondents.

GENTLEMEN: You will please take notice that we have filed in court in the above-entitled cause a certified copy of the record of proceedings in the surrogate court, Kings county, State of New York, in the matter of the probate of the will of Robert I. Robison, late of the city of New York, deceased.

Dated Portland, December 23, 1882.

Yours, &c., THOMAS & BIRD,
Solicitors for Complainant.

To Messrs. J. & E. M. Rand, solicitors for defendants.

25 DECEMBER 23, 1882.

I hereby acknowledge service of the above notice.

E. H. DAVEIS,
Solicitor for Home for Aged Indigent Women.

UNITED STATES OF AMERICA, *Maine District:*

Personally appeared W. W. Thomas, Jr., and made oath that he served the notice of which the above is a true copy on J. & E. M. Rand, solicitors as above, by giving said notice to John Rand in hand on December 23, 1882.

Before me this 20th day of February, A. D. 1883.

[L. S.] A. H. DAVIS, *Clerk.*

Exemplified Copy of Record.

On Probate of the Will of ROBERT I. ROBISON in the Surrogate Court, Kings County, N. Y.

To A. H. Dailey, Esq., surrogate of the county of Kings:

The petition of Jane S. Robison, of the city of Brooklyn, in the county of Kings, respectfully shows—

I. That Robert I. Robison, late of the city of Brooklyn, in the county of Kings, departed this life on the 13th day of June, in the year one thousand eight hundred and seventy-eight, having previously, as your petitioner is informed and believes, duly made and executed his last will and testament.

II. That the said deceased was a citizen of the United States, of full age, and was, at or immediately previous to his death, an inhabitant of the county of Kings aforesaid.

26 III. That his said last will and testament relates to both real and personal estate, and that the value of the personal

property belonging to the deceased at the time of his death does not, as your petitioner is informed and believes, exceed twenty-five thousand dollars.

IV. That your petitioner, who is the widow of the said deceased, and John Rand, Esq., of the city of Portland, Maine, are the executors named in the said will.

V. That the names and places of residence of the widow, heirs-at-law, and next of kin of the said deceased, so far as the same can be ascertained upon diligent inquiry, are as follows: Jane S. Robison, 197 De Kalb avenue, Brooklyn, N. Y.; John A. Codman, Boston, Mass.; Henry Codman, Boston, Mass.; Catharine E. Codman, Bristol, R. I.; Arthur Codman, Bristol, R. I.; Maria P. Codman, Bristol, R. I.; Edward W. Codman, Boston, Mass.; Mrs. Jane Frothingham, Brooklyn, N. Y.; Mrs. Jane Marcon, Boston, Mass.; Mrs. Mary Elizabeth Codman, Bristol, R. I.; Mrs. Martha S. Chewett, Toronto, Canada; Geo. H. Blanchard, whose residence cannot be ascertained; Samuel Homer Noyes, Bridgton, Maine; Mrs. Elizabeth N. Kent, Portland, Maine; Abial T. Noyes, Portland, Maine; Pierce B. Noyes, whose residence cannot be ascertained; Mrs. Eliza R. Hamlin, Portland, Maine; Mrs. Frances Shepley, Portland, Maine; George Cahoon, Linden, Vermont; James Cahoon, Linden, Vermont; George Cahoon, Jr., Linden, Vermont; Mary Cahoon, Linden, Vermont; Charles Hamlin, Augusta, Maine.

VI. That all the persons above named as the widow, heirs-at-law, and next of kin of the said deceased are, as your petitioner is informed and believes, of full age, except the said James Cahoon, whom she believes to be a minor without any general guardian within this State; the said George Cahoon, Jr., whom she believes to be a minor without any general guardian within this State, and the said Mary Cahoon, whom she believes to be a minor without any general guardian within this State.

27 VII. That all the persons above named as the widow, heirs-at-law, and next of kin of the said deceased are, as your petitioner is informed and believes, of sound mind.

Your petitioner therefore prays that a citation may issue to the said widow, heirs-at-law, and next of kin of the deceased requiring them to appear before the surrogate of the county of Kings on such day as the said surrogate shall direct, to attend the probate of said last will and testament.

JANE S. ROBISON.

CITY OF BROOKLYN, }
County of Kings, } ss:

I, Jane S. Robison, the petitioner named in the foregoing petition, being duly sworn, do depose and say that I have read the foregoing petition, to which I have subscribed my name, and know the contents thereof, and that the matters of fact therein stated are true, and that the matters therein stated of my information and belief I believe to be true.

JANE S. ROBISON.

Sworn to before me this 15th day of August, 1878.
JUDAH B. VOORHEES,
Clerk to Surrogate's Court.

At a surrogate's court held in and for the county of Kings, at the surrogate's office, in the city of Brooklyn, on the 15th day of August, 1878.

Present: A. H. Dailey, Esquire, surrogate.

In the Matter of Proving the Instrument Propounded as the Last Will and Testament of ROBERT I. ROBISON, Deceased.

A petition, duly verified by Jane S. Robison, the petitioner herein, having been filed in the office of the surrogate of the county of Kings on the 15th day of August, 1878, propounding for probate the
28 the last will and testament of Robert I. Robison, late of the city of Brooklyn, deceased, as a will of real and personal estate, and the said petition showing to my satisfaction who are the widow, heirs, and next of kin of the said Robert I. Robison, deceased, and their respective residences, now, on motion of Mr. Willard Bartlett, counsel for the said petitioner—

It is ordered that a citation issue to the persons designated in the said petition as the widow, heirs, and next of kin of the said deceased requiring them to appear in this court on the first day of October, 1878, at ten o'clock in the forenoon of that day, to attend the probate of said will.

A. H. DAILEY, *Surrogate.*

At a surrogate's court held in and for the county of Kings, at the surrogate's office, in the city of Brooklyn, on the first day of October, in the year one thousand eight hundred and seventy-eight.

Present: Abram H. Dailey, Esquire, surrogate.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Deceased.

This being the return day of the citation, the executrix appeared, by Willard Bartlett, Esq., her counsel; Butler, Stillman & Hubbard appeared as counsel for residuary legatees; Abial T. Noyes also appeared in person.

Ordered that a new citation issue to the heirs-at-law and next of kin, returnable the nineteenth day of November next at 10 o'clock a. m.

At a surrogate's court held in and for the county of Kings, at the surrogate's office, in the city of Brooklyn, on the nineteenth day of November, in the year 1878.

Present: Abram H. Dailey, Esquire, surrogate.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Deceased.

29 On motion of Willard Bartlett, it is ordered that Judah B. Voorhees, of the city of Brooklyn, be, and is hereby, appointed

the special guardian for James Cahoon, George Cahoon, Jr., and Mary Cahoon, minors, to take care of their interests in the matter of proving the will of said deceased.

A. H. DAILEY, *Surrogate.*

I consent to serve as special guardian for the minors named in the above order, to take care of their interest in the matter of proving the last will and testament of Robert I. Robison, deceased.

Brooklyn, Nov. 19, 1878.

JUDAH B. VOORHEES.

The people of the State of New York to Jane S. Robison, of 197 De Kalb avenue, Brooklyn, N. Y.; Mrs. Jane Frothingham, of Brooklyn, N. Y.; John A. Codman, Henry Codman, Edward W. Codman, and Mrs. Jane Marcon, of Boston, Mass.; Catherine E. Codman, Arthur Codman, Maria P. Codman, and Mrs. Mary Elizabeth Codman, of Bristol, R. I.; Mrs. Martha S. Chewett, of Toronto, Canada; Samuel Homer Noyes, of Bridgton, Maine; Mrs. Elizabeth N. Kent, Abial T. Noyes, Mrs. Eliza R. Hamlin, and Mrs. Frances Shepley, of Portland, Maine; George Cahoon, James Cahoon, George Cahoon, Jr., and Mary Cahoon, of Linden, Vermont; Charles Hamlin, of Augusta, Maine, and George H. Blanchard and Pierce B. Noyes, whose residences are unknown and cannot upon diligent enquiry be ascertained:

Whereas Jane S. Robison, of the city of Brooklyn, has lately applied to our surrogate of the county of Kings to have a certain instrument in writing, bearing date the thirty-first day of October, 1862, relating to real and personal estate, duly proved as the last will and testament of Robert I. Robison, late of the city of Brooklyn, deceased.

Wherefore you and each of you are hereby cited and required to appear before our said surrogate, at his office in the county court-house, in the city of Brooklyn, on the nineteenth day of November next, at ten o'clock in the forenoon, and attend the probate of the said last will and testament.

In witness whereof Abram H. Dailey, Esq., surrogate of our said county, has hereunto affixed the seal of the surrogate's court the first day of October, one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

JUDAH B. VOORHEES,
Clerk of the Surrogate's Court.

Copy of Citation Above.

STATE OF NEW YORK, }
City and County of Albany, } ss:

Matthew Bray, of the city of Albany, being duly sworn, says that he is a foreman in the office of The Argus, State paper, a daily newspaper printed and published in the city and county of Albany aforesaid, and that the notice of which the printed copy is annexed has

been regularly published in the said The Argus once in each week for six weeks successively, commencing on the 5th day of October, 1878.

MATTHEW BRAY.

Fees, $12.00. Paid.

THE ARGUS COMPANY.

Sworn before me this 16th day of November, 1878.

M. V. DOLAN,
Commissioner of Deeds.

31 CITY AND COUNTY OF NEW YORK, *ss:*

Surrogate's Court, County of Kings.

In the Matter of the Petition of JANE S. ROBISON for Probate, &c.

Clarence D. Cruikshank, being duly sworn, says: I am a clerk in the office of Mr. Willard Bartlett, attorney for Jane S. Robison, the petitioner herein. On the 2d day of November, 1878, at No. 197 De Kalb avenue, in the city of Brooklyn, I served the annexed citation on Jane S. Robison, one of the persons named therein, by handing to and leaving with Mr. W. L. Northam, a person of suitable age and discretion, at the place of residence of the said Jane S. Robison, a copy of said citation, the said Northam promising to deliver the said copy — citation to Mrs. Robison.

On the same day, at No. 105 Gates avenue, in the city of Brooklyn, I served the annexed citation on Mrs. Jane Frothingham, one of the persons named in said citation, by handing to and leaving with the husband of the said Jane Frothingham, at her place of residence, a copy of said citation, her said husband saying that "it would be all right."

C. D. CRUIKSHANK.

Sworn to before me this 12th day of November, 1878.

JOSEPH KUNZMANN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Surrogate's Court, County of Kings.

In the Matter of Proving the Instrument Propounded as the Last Will and Testament of ROBERT I. ROBISON, Deceased.

Frank Sperry, being duly sworn, says that he is employed in the office of Willard Bartlett, Esq., the attorney for Jane S.
32 Robison, the proponent of the will herein, and that on the 17th day of October, 1878, he deposited a copy of the annexed citation, securely enclosed in a post-paid envelope, in the general post office at the city of New York, directed to each one of the following persons named therein, at their respective places of residence, to wit: John A. Codman, Boston, Mass.; Henry Codman, Boston, Mass.; Edward W. Codman, Boston, Mass.; Mrs. Jane Marcon, Boston, Mass.; Catharine E. Codman, Bristol, R. I.; Arthur Codman,

Bristol, R. I.; Maria P. Codman, Bristol, R. I.; Mrs. Mary Elizabeth Codman, Bristol, R. I.; Mrs. Martha S. Chewett, Toronto, Canada; Samuel Homer Noyes, Bridgton, Maine; Mrs. Elizabeth N. Kent, Portland, Maine; Abial T. Noyes, Portland, Maine; Mrs. Eliza R. Hamlin, Portland, Maine; Mrs. Frances Shepley, Portland, Maine; George Cahoon, Linden, Vt.; James Cahoon, Linden, Vt.; George Cahoon, Jr., Linden, Vt.; Mary Cahoon, Linden, Vt.; Charles Hamlin, Augusta, Maine.

FRANK SPERRY.

Sworn to before me this 18th day of October, 1878.

JOSEPH KUNZMANN,
Notary Public (93), *N. Y. Co.*

Objections and Answers to Petition for Probate, &c.

N. Y. Surrogate's Court, County of Kings.

In the Matter of the Petition, &c., of JANE S. ROBISON for Probate, &c.

The answer of the Portland Female Orphan Asylum, the Widows' Wood Society, and the Home for Aged Indigent Women, all of the city of Portland, Maine, by Butler, Stillman & Hubbard, their attorneys, to the petition of said Jane S. Robison, respectfully shows—

33 First. That they are, respectively, charitable institutions of the city of Portland, Maine, and legatees named in the last will and testament of Robert I. Robison, deceased.

Second. That their interests as such legatees in the estate of said testator *is* derived from the fourth article or paragraph of said will, which is in words and figures following, viz: "Fourthly. It is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleanora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the Widows' Wood Society, and one-third of the income to the Home for Aged Indigent Women, all of the city of Portland and State of Maine," and that both of said sisters died before said testator.

Third. That, as they are informed and believe, said testator was not, at or immediately previous to his death, an inhabitant of the county of Kings, and they therefore deny each and every allegation in that behalf in said petition contained.

Fourth. That, as they are informed and believe, said testator, at the time of his death, left no real estate or other assets within the meaning and intent of section 2 of title I of chap. II of part III of the N. Y. Revised Statutes within the said county of Kings.

Fifth. That, as they are informed and believe, said testator, at the time of his death, was domiciled in the city of Portland, State of

Maine, but temporarily sojourning in the State of New York, and not an inhabitant of the county of Kings aforesaid within the meaning and intent of said Revised Statutes.

Sixth. That they object to the jurisdiction of the surrogate
34 of said county of Kings to receive said will for probate, for the reasons, among others, aforesaid.

Wherefore they pray that said petition may be dismissed.

BUTLER, STILLMAN & HUBBARD,
Proctors for Legatees Above Named.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas H. Hubbard, being first duly sworn, deposes and says that he is one of the attorneys for the legatees above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that deponent's knowledge and the grounds of his belief are derived from written communications received from the attorney for said legatees at Portland, Maine, and that the reason this verification is not made by said legatees is that none of their officers are now within this county or State, as deponent verily believes.

THOS. H. HUBBARD.

Sworn to before me this 29th day of November, 1878.

DANIEL A. O'CONNELL,
Notary Public, N. Y. Co.

KINGS COUNTY, *To wit:*

Kings County Surrogate's Court.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Late of the City of Brooklyn, Deceased.

Jason Berry, of Oil City, in the State of Pennsylvania, being duly sworn and examined before Abram H. Dailey, Esquire,
35 surrogate of the county of Kings, doth depose and say that he was well acquainted with Robert I. Robison, now deceased; that the subscription of the name of the said Robert I. Robison, deceased, at the end of the instrument now shown to this deponent and offered for probate as the last will and testament of the said Robert I. Robison, deceased, and bearing date the thirty-first day of October, in the year one thousand eight hundred and sixty-two, was acknowledged by the said deceased Robert I. Robison to have been made to Charles H. Adams, B. F. Harris, and to this deponent; that at the time of acknowledging such subscription the said Robert I. Robison, deceased, declared the said instrument so subscribed by him to be his last will and testament to this deponent and the said Charles H. Adams and B. F. Harris, and that thereupon this deponent and the said Charles H. Adams and B. F. Harris signed their names as witnesses at the end of said instrument, at the request of

the said Robert I. Robison, deceased, and in his presence, and that the said Robert I. Robison, deceased, at the time of executing said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint; and deponent further says that the said Charles H. Adams is dead, as he is informed and believes; and he likewise says that the said B. F. Harris is a resident of Portland, Maine, and not within the State of New York, as deponent is informed and verily believes.

JASON BERRY.

Subscribed and sworn this 26th day of November, A. D. 1878.
A. H. DAILEY, *Surrogate.*

36 Surrogate's Court, Kings County.

In the Matter of the Last Will and Testament of ROBERT I. ROBISON, Deceased.

NOVEMBER 26, 1876.

Before Hon. A. H. Dailey, surrogate.

Appearances: Willard Bartlett, Esq., for the will; Butler, Stillman & Hubbard, for contestants.

JASON BERRY, being duly sworn in behalf of the will, testified as follows:

By Mr. BARTLETT:

Q. Where do you reside?
A. Oil City, Venango county, Pennsylvania.
Q. How long have you resided there?
A. Twelve years.
Q. Were you formerly a resident of the State of Maine?
A. Yes, sir.
Q. You were a resident of that State, were you not, in the year 1862?
A. Yes, sir.
Q. And during the whole of that year?
A. Yes, sir.
Q. Where did you live in Portland at that time?
A. At the Preble House, corner of Congress and Preble streets.
Q. It is a well-known hotel in that city?
A. Yes, sir.
Q. Who was the proprietor of that hotel then?
A. Charles H. Adams.
Q. Were you acquainted with the late Robert I. Robison?
A. Yes, sir; I knew him as a guest of the hotel.
Q. Was he a guest at that house in the year 1862?
A. He was.

37 Q. I now show you the instrument which is offered for probate in this proceeding as the last will and testament of the said Robert I. Robison. Whose name is subscribed thereto?
A. Robert I. Robison.
Q. Were you present at the execution of that instrument?

A. Yes, sir.
Q. Where did it take place?
A. At the office of the hotel—at the counter or desk.
Q. On the 31st day of October, 1862?
A. As regards that, I have to take the date from my remembrance.
Q. You have no doubt that is the date?
A. No, sir.
Q. Who was present?
A. I know Mr. Charles H. Adams and B. F. Harris and myself were present, and Mr. Robison.
Q. Do you remember whether Mr. Robison signed this instrument in your presence or had signed it before you saw it?
A. I am not sure. I distinctly remember him saying "this is my will; that is my signature."
Q. He said this to each of you?
A. He said it to us collectively, and to Mr. Harris individually, I believe, because Mr. Harris was the one who asked if this was his signature.
Q. He said this to all of you—to Mr. Charles H. Adams, B. F. Harris, and yourself?
A. Yes, sir.
Q. And he said that this was his signature?
A. Yes, sir.
Q. At the same time?
A. Yes, sir; he acknowledged that to be his signature.
Q. And then did you sign this as a witness?
A. Yes, sir.
Q. And each of these gentlemen also?
A. Yes, sir; as a witness to his signature.
38 Q. As a witness to the will?
A. Yes, sir; that is what we signed; that was the object of our signing.
Q. He asked you to sign it?
A. Yes, sir; he said he wanted three gentlemen, and he said, "Mr. Adams—here, will you sign this?"—and Mr. Harris and myself.
Q. And you all thereupon did sign it at his request?
A. Yes, sir.
Q. And he was there at the time you all signed it?
A. Yes, sir; he stood by.
Q. State whether, according to the best of your knowledge and belief, Mr. Robison at that time was over the age of twenty-one years.
A. He was.
Q. And was he, apparently, of sound mind and memory?
A. Yes, sir.
Q. And not under any restraint?
A. No, sir.
Q. Do you know what has become of Charles H. Adams, whose name is signed as a witness to this will?

A. He has died since. I could not tell you the date of his death, but two or three years have passed.

Q. I now show you his name as affixed to this instrument, and ask you whether you recognize the signature.

A. Yes, sir.

Q. You recognize the signature of Janson Berry as yours?

A. Yes, sir.

Q. And you recognize that as Mr. Harris' signature?

A. I would not say in regard to that, but I remember Mr. Harris being the gentleman who signed it.

Q. You have no doubt of that fact?

A. No, sir; but I was not so well acquainted with his signature. I know Mr. Adams' signature.

Q. At that time Mr. Harris was a resident of Portland?

39 A. Yes, sir; he was in business there.

Q. And have you any information as to his present residence?

A. I have indirect information that he resides in Portland.

Q. You have no knowledge of his being within this State as a resident?

A. No, sir.

Q. You know the handwriting of Mr. Robison?

A. Well, I don't think I do; but I know that that was his name—Robison.

Q. You have no doubt that this was the instrument that was executed in your presence?

A. No, sir; it must be.

Cross-examination by Mr. NOTMAN:

Q. You state that you don't know Mr. Robison's signature; have you any doubt that that signature affixed to this instrument is Mr. Robison's signature?

A. I have not the least doubt of the genuineness of the signature.

Q. And I understand that you are not acquainted with Mr. Harris' handwriting and can't say that this is his signature?

A. I could not say in regard to that signature.

Q. But you distinctly remember the fact that he signed the will as a witness in your presence?

A. Yes, sir; we signed it all right along together.

Q. Do you know where Mr. Robison resided during the past year?

A. No, sir; I do not.

Q. No knowledge at all on that subject?

A. No, sir.

Q. Have you any knowledge as to whether or not he left any property at the time of his death?

40 A. I have not.

Q. Have you any interest under the will?

A. No, sir; not that I know of; I did not read it through.

Q. How long had you been acquainted with Mr. Robison before the execution of that will in Portland?

A. Yes, sir.
Q. Where did it take place?
A. At the office of the hotel—at the counter or desk.
Q. On the 31st day of October, 1862?
A. As regards that, I have to take the date from my remembrance.
Q. You have no doubt that is the date?
A. No, sir.
Q. Who was present?
A. I know Mr. Charles H. Adams and B. F. Harris and myself were present, and Mr. Robison.
Q. Do you remember whether Mr. Robison signed this instrument in your presence or had signed it before you saw it?
A. I am not sure. I distinctly remember him saying "this is my will; that is my signature."
Q. He said this to each of you?
A. He said it to us collectively, and to Mr. Harris individually, I believe, because Mr. Harris was the one who asked if this was his signature.
Q. He said this to all of you—to Mr. Charles H. Adams, B. F. Harris, and yourself?
A. Yes, sir.
Q. And he said that this was his signature?
A. Yes, sir.
Q. At the same time?
A. Yes, sir; he acknowledged that to be his signature.
Q. And then did you sign this as a witness?
A. Yes, sir.
Q. And each of these gentlemen also?
A. Yes, sir; as a witness to his signature.
38 Q. As a witness to the will?
A. Yes, sir; that is what we signed; that was the object of our signing.
Q. He asked you to sign it?
A. Yes, sir; he said he wanted three gentlemen, and he said, "Mr. Adams—here, will you sign this?"—and Mr. Harris and myself.
Q. And you all thereupon did sign it at his request?
A. Yes, sir.
Q. And he was there at the time you all signed it?
A. Yes, sir; he stood by.
Q. State whether, according to the best of your knowledge and belief, Mr. Robison at that time was over the age of twenty-one years.
A. He was.
Q. And was he, apparently, of sound mind and memory?
A. Yes, sir.
Q. And not under any restraint?
A. No, sir.
Q. Do you know what has become of Charles H. Adams, whose name is signed as a witness to this will?

A. He has died since. I could not tell you the date of his death, but two or three years have passed.

Q. I now show you his name as affixed to this instrument, and ask you whether you recognize the signature.

A. Yes, sir.

Q. You recognize the signature of Janson Berry as yours?

A. Yes, sir.

Q. And you recognize that as Mr. Harris' signature?

A. I would not say in regard to that, but I remember Mr. Harris being the gentleman who signed it.

Q. You have no doubt of that fact?

A. No, sir; but I was not so well acquainted with his signature. I know Mr. Adams' signature.

Q. At that time Mr. Harris was a resident of Portland?

39 A. Yes, sir; he was in business there.

Q. And have you any information as to his present residence?

A. I have indirect information that he resides in Portland.

Q. You have no knowledge of his being within this State as a resident?

A. No, sir.

Q. You know the handwriting of Mr. Robison?

A. Well, I don't think I do; but I know that that was his name—Robison.

Q. You have no doubt that this was the instrument that was executed in your presence?

A. No, sir; it must be.

Cross-examination by Mr. NOTMAN:

Q. You state that you don't know Mr. Robison's signature; have you any doubt that that signature affixed to this instrument is Mr. Robison's signature?

A. I have not the least doubt of the genuineness of the signature.

Q. And I understand that you are not acquainted with Mr. Harris' handwriting and can't say that this is his signature?

A. I could not say in regard to that signature.

Q. But you distinctly remember the fact that he signed the will as a witness in your presence?

A. Yes, sir; we signed it all right along together.

Q. Do you know where Mr. Robison resided during the past year?

A. No, sir; I do not.

Q. No knowledge at all on that subject?

A. No, sir.

Q. Have you any knowledge as to whether or not he left any property at the time of his death?

40 A. I have not.

Q. Have you any interest under the will?

A. No, sir; not that I know of; I did not read it through.

Q. How long had you been acquainted with Mr. Robison before the execution of that will in Portland?

A. Well, sir, I could not state; it may have been a year, a year and a half, or two years, and it may have been less than one year; I could not state how long I knew him.

Q. Do you mean, during the period of this acquaintance, he had been a resident of Portland?

A. Yes, sir; he was one of the guests at the house during my acquaintance with him; I could not say how long he had been there before or after.

Q. Were you acquainted with his business?

A. No, sir; I was not.

Q. What was your occupation at that time?

A. I was a book-keeper and clerk for the hotel.

Q. Do you know whether or not Mr. Robison was engaged in any business in Portland?

A. Well, I do not; he seemed to have leisure time; he may have been in business, but he appeared more like a retired gentlemen, to a certain extent; but likely he may have had business interests going on at the time.

Q. When did you leave the Preble House?

A. I left the house—I was there in 1865, but I think unconnected with the house—perhaps not after 1863; I am not able to state the length of time.

Q. When you left the Preble House was Mr. Robison still living there?

A. I could not say, sir; I am not distinct in my recollection; I was part of the time away to another house during the winter and summer season, and then I was away for another period during another summer season.

Q. Have you any personal knowledge of Mr. Robison's movements after the execution of the will?

41 A. I should think likely I saw him immediately after, but I could not say how long. I haven't seen him for twelve years.

Q. Have you any personal knowledge of his movements?

A. No, sir.

Q. No recollection whatever?

A. No, sir.

(Mr. Bartlett read in evidence the following section from Revised Statutes of Maine: "Sec. 1. A person of sound mind and of the age of 21 years may dispose of his real and personal estate by will in writing, signed by him or by some person for him, at his request and in his presence, and subscribed in his presence by three attesting witnesses not beneficially interested under said will.")

By Mr. BARTLETT:

Q. Did you mean that Mr. Robison was continuously at the Preble House while you were there, or that he was there from time to time as a guest?

A. He kept rooms there continuously—that is, he had rooms, but he may have been away on a visit; but while he was there he was

there continuously. He held his rooms, but not all the time. I was there before him.

By Mr. NOTMAN:

Q. Do you know what became of the will after it was executed?
A. Mr. Robison took it.

(Mr. Stillman raised the question as to whether, at the time of his death, the deceased was a resident of the State of New York or had any property in the State.)

(S'd) JASON BERRY.

(Adjourned to December 2, 1878, at 1.30 p. m.)

42 KINGS COUNTY, *To wit:*

Kings County Surrogate's Court.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Late of the City of Brooklyn, Deceased.

Jane S. Robison, of the city of Brooklyn, N. Y., being duly sworn and examined before Abram H. Dailey, surrogate of the county of Kings, doth depose and say that she was well acquainted with Robert I. Robison, of the city of Brooklyn, N. Y., and with his manner and style of handwriting, having often seen him write, and that she verily believes that the signature "Robert I. Robison" signed at the end of the instrument in writing now produced and shown to the deponent, bearing date the thirty-first day of October, in the year one thousand eight hundred and sixty-two, purporting to be the last will and testament of the said Robert I. Robison, deceased, is the true, genuine handwriting and signature of the said Robert I. Robison, and that the said Robert I. Robison died at No. 197 De Kalb avenue, in the said city of Brooklyn, on the 13th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and that deponent attended his funeral.

JANE S. ROBISON.

Subscribed and sworn this 2d day of December, A. D. 1878.
A. H. DAILEY, *Surrogate.*

In the Same Matter.

DECEMBER 2, 1878.

Same appearances.

JANE S. ROBISON, being duly sworn on behalf — the will, testified as follows:

43 By Mr. BARTLETT:

Q. You are the widow of Mr. Robert I. Robison, whose will has been offered here for probate?
A. I am.
Q. When did he die?
A. The 13th of June of the present year.

Q. Where?
A. In Brooklyn, N. Y.
Q. At what place?
A. At the house No. 197 De Kalb avenue.
Q. The house of your brother, Mr. William L. Northam?
A. Yes, sir.
Q. When were you married?
A. I was married in April, 1841.
Q. Where?
A. In Newport, R. I.
Q. At the time that this paper offered here for probate was executed Mr. Robison and yourself were in Maine, were you not?
A. We were boarding at the Preble House, Portland, Maine.
Q. You had previously resided in that city?
A. Resided in Park street, in our own house.
Q. At what time did you give up your residence in that city?
A. In 1845—1844 or 1845; I think 1845.
Q. Did you give up your residence in Portland?
A. Oh, our residence in Portland; we gave up our residence in Portland in 1862.
Q. And Mr. Robison rented his house there?
A. He rented his house in 1862.
Q. And in 1864 or 1865 he sold his house there, did he not?
A. Yes, sir.
Q. And left Portland?
44 A. He did.
Q. Did he ever reside in Portland after that time?
A. Never.
Q. How many months has he spent altogether in Portland since that time up to the time of his death?
A. I presume, in the last sixteen years, 5 or 6 months, maybe more.
Q. And then only boarding there?
A. Yes, sir.
Q. For short periods of time?
A. Two or three weeks at a time.
Q. He went from Portland where to live?
A. He went from Portland to Philadelphia to reside.
Q. You lived in Philadelphia winters?
A. Yes, sir.
Q. How many winters?
A. Seven winters.
Q. You went there not long after you left, did you not?
A. Yes, sir.
Q. And you lived there till 1871 or 1872?
A. Yes, sir; and then we decided to come to Brooklyn.
Q. And what did Mr. Robison ever say to you as to his intention to change his residence from Philadelphia?
A. As my health had so much improved in Philadelphia while I was visiting there, he decided to come to Brooklyn.
Q. He said so to you?

A. He did.

Q. What did he state to you with reference to making Brooklyn his home?

A. It would be much pleasanter, as we had our relatives here. We only went to Philadelphia on account of my health.

Q. And was Brooklyn your chief place of residence from that time to the time of his death?

A. Yes, sir.

45 Q. And you spent the winters here, with the exception of visiting California?

A. Yes, sir.

Q. In 1873 you were in California?

A. Yes, sir.

By the SURROGATE:

Q. You made Brooklyn your home, and it was understood to be your home?

A. Yes, sir; for the last seven years.

By Mr. BARTLETT:

Q. At my request have you prepared a memorandum showing the localities at which you and your husband resided for the past sixteen years?

A. Yes, sir; I have.

Q. And that is based upon your personal knowledge of your movements during that time?

A. Yes, sir.

Q. (Showing witness paper.) Is this the memorandum?

A. Yes, sir.

(Paper offered in evidence, marked Ex. A, December 2, 1878.)

Q. At the time of his death had your husband any property in this county?

A. He had.

Q. (Showing witness paper.) That is a memorandum of the property that you have prepared?

A. Yes, sir.

Q. Please read it.

A. Certificate of 150 shares Mt. Washington summit road.
" 157 " Mt. Diable road.
" 100 " Comet Silver Mining Co.

46 Note of M. Libby and wife, $1,534.00.
" " " 528.17.
" George M. Burnham, 2,600.00.

Q. Did he leave any personal effects, in addition to the property stated?

A. A watch, chain, and other jewelry, valued at $250, and articles of silver, $50.

(Counsel for contestant admits that the witness will testify to the facts contained in Exhibit A.)

Cross-examination by Mr. NOTTMAN:

Q. How old was your husband at the time of his death?

A. Seventy last January.

Q. I understand you to testify that at one time you kept house in Park street, in Portland?

A. Yes, sir.

Q. Was Mr. Robison in any business in Portland?

A. He was at that time.

Q. Please state what it was.

A. He was in the oil-manufacturing business.

Q. Where did he carry it on?

A. In Exchange street, Portland.

Q. Up to what year was he engaged in business there?

A. He gave up his business in 1862 or 1863—wound it up.

Q. Since that date has he transacted business in any other place?

A. He has not; he retired from business.

Q. When did you leave the Park-street house?

A. In 1861.

Q. And you sold it in 1865?

A. Yes, sir.

Q. Where was Mr. Robison in the habit of voting?

A. He did not vote at all since he left Portland.

47 Q. He never voted since he left Portland?

A. I don't think he did. I have urged him to do so, but he said he had no right.

Q. What was the state of Mr. Robison's health subsequent to 1872?

A. Always perfect until the last year or two of his life.

Q. You have no family, I understand?

A. No, sir.

Q. Have you ever kept house with your husband since living in Park street, Portland?

A. No, my health not being able to do it.

Q. At the time your husband died in Brooklyn in what manner were your living?

A. We were at my brother's, 197 De Kalb avenue, Brooklyn.

Q. How long had you been there?

A. I had been there for four or five weeks in Brooklyn, but we had passed part of it in Washington—leaving Brooklyn for Washington.

Q. Then, do I understand you were a guest at your brother's house?

A. No; we were boarding there.

Q. Paying board?

A. Boarding; yes, sir.

Q. I am trying to find out whether you were a guest, in the pure sense of the word, or were paying board.

A. It was our home at the time. We have had various homes in Brooklyn.

Q. I want to find out whether you were guests in your brother's house?

A. No, sir; not guests. We considered Brooklyn our home, and we were to go on shortly to the White Mountains, as usual, for the summer, but my husband being taken sick we were detained.

Q. You were not paying board?

48 A. Yes, sir; we were paying board.

Q. Previous to the 4 or 5 weeks prior to your husband's death where had you been living?

A. We were detained in Washington on account of his health. He was under a physician's care.

Q. How long have you been there?

A. Since last December—no, it was January. We arrived there the 8th of last January.

Q. Where had you been living there?

A. We were boarding with Mrs. Pence, on Vermont avenue.

Q. And previous to January of this year, before you went to Washington, where had you been living?

A. We had passed our summers at the White Mountains and our winters in Brooklyn, except when we were in California on a visit—three winters.

Q. Previous to this last visit to Brooklyn where were you?

A. We were boarding at another house in Jerolemon street.

Q. Just prior to the last visit when was the next time immediately before that that you were at Brooklyn?

A. We were here in the autumn until December. Then we went to Washington.

Q. And you staid there until when?

A. We came here in November. We returned from the White Mountains, staying at Portland two or three weeks for Mr. Robison to sell some property, which he did.

Q. When you arrived here in November how long after that did you stay in Brooklyn?

A. We staid five weeks.

Q. Where were you stopping there?

A. I think it was Jerolemon street, corner of Clinton; it was corner of some street.

Q. Were you boarding there?

A. Yes, sir; with Mrs. Judge Nye.

49 Q. Previous to your going to the White Mountains for the summer of 1877 when had you been in Brooklyn last?

A. I had spent the winter in Brooklyn.

Q. The winter of 1876 and 1877?

A. Yes, sir.

Q. Whereabouts?

A. At my brother's house; boarded at my brother's.

Q. In De Kalb avenue?

A. Yes, sir; the same place.

Q. Between what times were you there?

A. We left there the last of May or the first of June, and then we went to the White Mountains, Mr. Robison stopping a little while in Portland for a visit.

Q. When did you arrive at your brother's in the winter of 1876 and 1877?
A. In November, I think, of 1877.
Q. Then I understand that up to June you boarded in Brooklyn?
A. This last year when I boarded at my brother's in Brooklyn.
Q. You didn't mean this last June?
A. This last June; yes, sir.

By Mr. BARTLETT:

Q. Mr. Nottman wants to know if it was in the autumn of the centennial year you came here and went to your brother's. What time was that?
A. I think it was November; that was the time.

By Mr. NOTTMAN:

Q. And staid until the June following?
A. Yes, sir.
50 Q. Previous to November of 1876 where had you been?
A. We were then boarding in Brooklyn, on Clinton street.
Q. Just previous to November where did you come from?
A. We came from California.
Q. How long had you been there?
A. We had been there two years and a half on a visit.
Q. When did you leave for California?
A. We left for California in 1873. We were there the autumn of 1873 and 1874, 1874–1875, 1875 and 1876, and we returned to Brooklyn in May.
Q. Between May and November of 1876, the centennial year, where were you?
A. We were at North Conway, White Mountains.
Q. Were you in Brooklyn any time in May after you came back?
A. Yes, sir; we stopped here four or five weeks.
Q. Where did you stop at that time?
A. At my brother's.
Q. Were you paying board at that time, or were you a guest?
A. Yes, sir; always paid board.
Q. Previous to your going to California in 1873 where had you been staying? From what place did you go to California?
A. We went from New York to California.
Q. New York city?
A. Yes, sir.

By the SURROGATE:

Q. How long has it been since your husband resided in Maine?
A. Sixteen years.

By Mr. NOTTMAN:

Q. Previous to 1873 where had you been living in New York before you went to California?
51 A. I had boarded in Clinton street two winters in succession.

Q. Previous to your going to California?
A. Yes, sir.
Q. Where had you spent your summers?
A. At North Conway; that was our summer residence.
Q. At any time since 1873 have you visited Portland?
A. We have. My husband had gone to try and get rid of his estate there.
Q. When were you last in Portland?
A. Last autumn a year ago; we stopped on our way to the White Mountains.
Q. How long were you there?
A. Three weeks; for Mr. Robison to sell a lot of land, which he did.
Q. Where were you living at that time?
A. We were boarding on the corner of Park street with Mr. Mussey.
Q. What other portions of the time have you spent in Portland since 1873?
A. Occasionally on trips to the White Mountains we would stop, as I had friends there and Mr. Robison had some business there trying to sell some property; that was the only motive to go there. Occasionally we staid three or four days, sometimes a week and sometimes ten days.

(Adjourned to December 3, 1878, at 10 a. m.)

52 *In the Same Matter.*

DECEMBER 3, 1878.

Same appearances.

JANE S. ROBISON recalled.

Cross-examination continued by Mr. NOTTMAN:

Q. Where was your husband buried?
A. He was buried in Portland.
Q. Did he own a burial plot there?
A. His father did.
Q. Did he?
A. No; it was a family vault.
Q. Others of his family were buried there besides him?
A. Two children, his brothers, sisters, father and mother, and aunts.
Q. Was he buried in the burial plot described in the will?
A. Yes, sir.
Q. Where was Mr. Robison's will found after he died?
A. It was found in Brooklyn.
Q. Carried it about with him?
A. He did.
Q. Were you aware of its existence before he died?
A. I didn't know where it was; I knew he had made his will.
Q. And where did you find it?
A. Found it in his case with his business papers.

Q. Did he carry that case about with him?
A. I presume he did; it was with him then.
Q. Where did you find that case?
A. He had it in his trunk.
Q. Did Mr. Robison own any real estate in Portland at the time of his death?
53 A. Some.
Q. Have you any personal knowledge of any personal property that was left by Mr. Robison in this county?
A. I suppose so; there was business papers that I am aware of. I have some in my possession.
Q. Do you know of any personal property whatever, except the business papers which you have spoken of?
A. Yes, sir; I do.
Q. What do you know of besides these business papers in this county?
A. Not any in this county.
Q. Then you know of none in this county, except what you have named?
—. ——.
Q. Did he own any real estate anywhere else, except in Portland?
A. He did not.

By the SURROGATE:

Q. What do you call business papers?
A. His business papers, his property, and his books; his property—his personal property.
Q. Stocks and bonds?
A. Stocks and bonds.

By Mr. NOTTMAN:

Q. Did you examine those papers that were left there?
A. I did.
Q. Can you state what any of them were?
A. Yes; I have them written down.
Q. Do I understand that you found in that bundle of papers 157 shares of the Mt. Washington railroad stock and the other property that you have given in that list?
54 A. Yes, sir.
Q. Do you know whether these shares of stock had any value at all?
A. I don't know much about them. I never enquired into that. I presume so.
Q. Do you know whether these notes have any value at all?
A. I presume they have.
Q. I am speaking of your knowledge. Have you any knowledge of it?
A. I could not say certainly, because I have not examined into that.
Q. Do you know who Mr. Libby and wife are?

A. I do.
Q. Where do they reside?
A. In Portland.
Q. Where does George Burnham?
A. In Portland.
Q. Do you know how long your husband had these notes?
A. I do not. Mr. Libby was his business agent.
Q. Where was this trunk at the time of Mr. Robison's death?
A. It was in his possession.
Q. Where, actually, was the trunk?
A. In my brother's house, where my husband was.
Q. When did it come there?
A. It came there this last spring with him.
Q. I understood you to say yesterday you came to your brother's house from Washington?
A. Yes, sir.
Q. You were not on a visit to Portland, stopping here on your way?
A. No; we had been to Washington on a visit for the winter and were detained by sickness.
Q. Were you not passing through Brooklyn to Portland when your husband died?
55 A. No; we were on our way to the White Mountains.
Q. Did you intend to go to Portland?
A. To stop for a few days on a visit.
Q. Do you know Mr. John Rand, the executor named in this will?
A. I do.
Q. Where does he reside?
A. Portland, Park street.
Q. Did your husband keep any bank account in Portland, to your knowledge?
A. I don't know that he did.
Q. With the exception of what you have mentioned as having been taken out of this trunk, do you know of any other property which your husband left within this county?
A. I do not.
Q. Except personal effects he might have had on his person?
A. No; I do not.
Q. Do you know how long he had held these certificates of stock?
A. Some of them some years, and some more recently; some within two, three, or four years.
Q. From 1866 to 1870 had your husband resided in Brooklyn at any time?
A. We passed two winters at a time in Brooklyn.
Q. Did you not pass the winters of 1866, 1867, and 1867 at Philadelphia?
A. We did.
Q. Did you not pass the winters of 1868, 1869, and 1870 at Philadelphia?
A. Yes, sir.

Q. Did you not pass all the summers at that time in North Conway?

A. Yes, sir; we did when we lived in Portland.

Q. Did you not spend the winters of 1870 and 1871 at Philadelphia?

56 A. We were not in Philadelphia in 1870 and 1871.

Q. In the fall of 1873 you were in California, were you not?

A. Yes, sir; 1873 and 1874.

Q. And you returned to Brooklyn in May, 1876, as I understand it?

A. Excuse me; we passed two whole autumns, winters, and springs before we went to California, three months at each time.

Q. When you returned from California?

A. We returned from California in May.

Q. How long were you in Brooklyn when you came back from California?

A. We were in Brooklyn about six weeks.

Q. Were you not a guest at your brother's?

A. We were not; we were never a guest there.

Q. You were boarding there?

A. Yes, sir.

Q. And then you left Brooklyn after those six weeks, and spent the summer at North Conway, did you not?

A. We did.

Q. Visiting Portland?

A. We did.

Q. And then the only time since then that you have been in Brooklyn, as I understand you, was a portion of the winter of 1876, with the exception of the few weeks that you were here previous to your husband's death?

Q. We were — eight months in 1876 and 1877.

Q. About the last winter you have already testified?

A. Part of the winter here and a few weeks in Washington, and returned to Brooklyn as soon as my husband was able to go back.

Q. I understand that you were in Washington from January until May or June, were you not?

A. We were in Washington until the first of May.

Q. And you had only been in Brooklyn for a few weeks previous—in the November or December previous?

57 A. Three; yes, sir. We left the first of May; we were home there from January to May; we went the 10th of January and left the first of May.

Q. And then you were simply in Brooklyn four or five weeks previous to your husband's death?

A. Yes, sir.

Q. And you were passing through to North Conway and Portland?

A. Yes, sir, as usual.

Q. Where was your husband born?

(Objected to. Excluded. Exception.)

Q. Did he have any relations in Brooklyn at the time of his death?
A. He had.
Q. You have read your husband's will, I suppose?
A. I have.
Q. Were you acquainted with the sisters of your husband mentioned in the will?
A. I was.
Q. Are they living yet?

(Objected to. Excluded. Exception.)

Q. With the exception of the legacies mentioned in the will you claim all the property of the estate, do you not?

(Objected to. Excluded. Exception.)

Q. Did your husband leave any children?
A. He did not.
Q. Where were you married?
A. In Newport, R. I.
Q. Has this will been offered for probate in any other court?

(Objected to. Excluded. Exception.)

Redirect examination by Mr. BARTLETT:

Q. State what, if anything, your husband ever said to you with reference to Portland as his residence.
58 A. He did not wish to return there at all.
Q. What did he state in reference to residing there, if anything?
A. That all his friends had left there and he did not care to go back again; his parents, his children were dead, and that was the reason he left.
Q. When did he lease his house there?
A. In 1865.
Q. That was the house in which you lived?
A. Which we owned and in which we lived.
Q. Didn't he lease it earlier?
A. He leased it first in 1861 and then sold it.
Q. That was the house in which you had lived prior to the death of your children?
A. Yes, sir.
Q. Since that time did you and your husband keep house?
A. No, sir.
Q. After leaving that house in 1861 where did you go?
A. To the Preble House to wind up his business.
Q. And while there Mr. Robison was engaged in what?
A. Winding up his business.
Q. In the spring of 1862 where did you go?
A. We went to Philadelphia.
Q. The summer of that year was spent where?
A. Northampton, Mass.

Q. Did Mr. Robison ever state to you why he left Portland and went to Philadelphia?

(Objected to. Excluded. Exception.)

Q. Upon leaving Portland, at the time you have stated, did Mr. Robison express any intention as to his future residence; and, if so, what?

A. To reside in Philadelphia, as a better climate at that time for my health.

Q. And from that time until the winter of 1871 or 1872 what was your place of residence?

59 (Objected to. Excluded. Exception.)

Q. In 1862, as you have said, you went to Philadelphia and spent the summer at Northampton. From Northampton where did you go?

A. Went to Philadelphia.

(By Mr. NOTTMAN: I will admit that that paper, Ex. A, is a portion of the witness' testimony.)

Redirect:

Q. Where were you in the summer of 1864?

A. In North Conway.

Q. (Showing witness photograph.) Where was that picture taken?

(Objected to. Allowed. Exception.)

A. At the Washington House, North Conway, New Hampshire.

Q. I show you the writing on the back. Whose handwriting is that, if you know?

(Objected to.)

A. It is my husband's.

Q. You know his handwriting and you have seen him write?

A. I have.

Q. Do you recognize his picture in that group?

(Objected to. Admitted. Exception.)

A. Yes, sir; it is the central one.

(Mr. Bartlett read the endorsement on the picture as follows: "Washington House, North Conway, N. H. Mr. and Mrs. Walls and dau., N. York; Mrs. Parker, N. York; Mrs. Nevins, N. York; Mrs. Ruster, Portsmouth; Dr. Thomas P. Gibbons, Philadelphia; Mr. and Mrs. R. I. Robinson, Philadelphia.")

(Objected to.)

Q. In the summer of 1871 where were you?

60 A. In California with my sister, on a visit.

Q. When did you return from California?

A. I returned in October.

Q. Did your husband, at or about that time, make any statement to you in regard to a proposed change of residence; and, if so, what?

A. He resolved, as my health was so much improved, it would be better to be where our friends were and connections were—in Brooklyn.

Q. After your return you spent the summers of 1872 and 1873 in Brooklyn?

A. Yes, sir.

Q. And have been here ever since that time, excepting during your visit to California with your husband, as you have already testified?

A. Yes, sir.

Recross-examination by Mr. NOTTMAN:

Q. When did your husband state that he did not wish to return to Portland?

A. He has always; he has said it so many times, I don't remember.

Q. You have testified, as I remember, as to the particular time?

A. When he left there he decided never to go back.

(Answer objected to as not responsive.)

Q. Where did he state that, and when?

A. He stated it in Portland, and he stated, after he got away from Portland, that he never wished to go back.

Q. He did not say, when he was in Portland, that he did not wish to return there?

A. He did, as a home.

Q. Did I understand you to testify that your husband was taken sick in Washington, previous to going to Brooklyn?

61 A. He was taken sick in Washington.

Q. Was he very ill in Washington?

A. He was under the physician's care all the time he was in Washington.

Q. Was he well or ill during the few weeks he was in Brooklyn before his death?

A. He improved as soon as he got back to Brooklyn. He improved greatly.

Q. Did he not, as a matter of fact, leave Washington to go to the White Mountains for the benefit of his health?

(Objected to.)

A. Not particularly for his health. He went, as he usually did, for pleasure.

Q. But when he left Washington he did not intend to take up any permanent residence in this county, as I understand you?

(Excluded and exception.)

Q. When your husband left Washington what did he say in respect to going to North Conway and the White Mountains?

A. To go there as usual and to return in the autumn to Brooklyn.

Q. All you know is that he said that he was going as usual to the White Mountains?

A. I don't know that he said that.

Q. Did he say anything in reference to his stopping in Brooklyn on his way north?

A. Of course he did.

Q. What did he say?

A. He said he intended to stay in Brooklyn until the weather got hot.

Q. I asked you if your husband said anything in Washington, previous to coming north, about stopping on the way up?

A. He did. He proposed to me to stay a few weeks on our way to North Conway.

Q. What was the condition of your husband's health im-
62 mediately after reaching Brooklyn as compared with his condition before he left Washington—better or worse?

A. He was improved until malaria developed, and then he was unable to go any further.

Q. Did he express any statement as to how long the intended stoppage in Brooklyn, on the way to North Conway, was to be prolonged?

A. He expected to stay until the weather was hot and then go to the country.

Q. When your husband and yourself were in the habit of traveling from one place to another, as you have testified, was he in the habit of registering at hotels his address as of the last city where he had been?

(Objected to. Excluded. Exception.)

Q. Were you living at a hotel in California?

A. We were.

Q. Were you living in a hotel in Washington?

A. We were not.

Q. At a boarding-house?

A. Yes, sir; a private boarding-house.

(S'd) JANE S. ROBISON.

DAVID FAIRBANKS, being duly sworn on behalf of the will, testified as follows:

Examined by Mr. BARTLETT:

Q. Where do you reside?

A. 432 Henry street, Brooklyn.

Q. Are you in business?

A. Yes, sir.

63 Q. Where?

A. In New York, 52 White street.

Q. In partnership?

A. Yes, sir.

Q. With whom?

A. With Mr. Martin—the firm of Fairbanks & Martin.
Q. Where does Mr. Martin live?
A. In Brooklyn.
Q. Were you acquainted with Robert I. Robison?
A. I was.
Q. How long had you been acquainted with him?
A. About thirty-five years.
Q. Were you intimately acquainted with him?
A. Yes, sir.
Q. For how long?
A. Well, twenty-five years of that time.
Q. Did he ever make any statement to you with reference to a change of residence?

(Objected to. Overruled and exception.)

A. He did.
Q. How long ago?
A. About ten years ago he said, in substance, to me that he had given up his business in Portland; was a citizen of Philadelphia; never expected again to return to Portland.
Q. Did he state anything further in regard to his change of residence?
A. He gave me the reason why.
Q. State what he said on that subject.
A. He declared his intention to give up his residence there on account of what he considered personal taxation in Portland, and, again, he said his wife could not live there since the death of her daughter, and that the family were here—mostly in Brooklyn—the relatives were; that seemed to be the principal reason.

64 Q. Do you know whether or not there was any property of Mr. Robison's in this State at the time of his death?
A. I do.
Q. State what property you know of being here at the time of his death.

(Objected to. Overruled and exception.)

A. He had placed in my hands, which I put into the hands of the firm in the Safe Deposit Company in their box there, about $5,000.00 of railroad bonds of the Leeds & Farmington railroad.
Q. Where does that railroad company do business?
A. I think it is in Maine.
Q. That property is still in your possession?
A. Yes, sir.
Q. And was in your possession at the time Mr. Robison died?
A. Yes, sir.
Q. And you know about when he died?
A. Yes, sir.
Q. State when, about.
A. I believe it was the 13th of June of the present year; it was certainly within a day or within a day or two of that.

Cross-examined by Mr. NOTTMAN:

Q. Where did you keep this property?

A. In the Safe Deposit Company, in New York.

Q. At the time of Mr. Robison's death was it in the Safe Deposit Company, in the county of New York?

A. Yes, sir.

Q. Did you have any property of Mr. Robison's in this county at the time of his death?

A. No.

65 Q. At the time Mr. Robison made the statement which you have testified to in respect to his leaving Portland where was that statement made?

A. That statement has been talked over repeatedly with me at my house in Brooklyn and at my place of business in New York, where he made his headquarters when he was here.

Q. Have you any personal knowledge of any other declaration of intention made by Mr. Robison subsequent to his having gone to Philadelphia?

A. No; it was while in Philadelphia this was made.

Q. And he was then a resident of Philadelphia?

A. He was then a resident of Philadelphia.

Q. Did you ever hear of the Mt. Washington Summit road?

A. I think I have been over it.

Q. Did you ever hear of that road having issued any capital stock?

A. I know nothing about the particulars of it.

Q. Did you ever hear of the Comet Silver Mining Company?

A. No.

Q. Do you know Mr. Libby?

A. I do not.

Q. Or George Burnham?

A. No.

(S'd) DAVID FAIRBANKS.

(Proponent rests.)

(Mr. Nottman moved, on the testimony presented, to dismiss the probate of the will, on the ground that it does not appear that there was no real or personal estate or property belonging to the deceased in Kings county at the time of his death.)

(Denied and exception.)

(Also on the ground that the proponent had failed to show that the deceased was a resident of Kings county at the time of his death.)

(Denied and exception.)

(Adjourned to December 17, 1878, at 10 a. m.)

66 At a surrogate's court held in and for the county of Kings, at the surrogate's office, in the city of Brooklyn, on the, nineteenth day of November, in the year one thousand eight hundred and seventy-eight.

Present: Abram H. Dailey, Esquire, surrogate.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Deceased.

The citation was returned with proof of due service. The executrix appeared in person and by Willard Bartlett, Esq., her counsel. Judah B. Voorhees, special guardian, appeared in person. Thos. H. Hubbard, Esq., appeared as counsel for the three corporations named as residuary legatees and devisees, and the matter was adjourned to the twenty-fifth day of November next, at 10 o'clock a. m.

In the Same Matter.

NOVEMBER 25, 1878.

Parties appeared as before, and this matter was adjourned to the twenty-sixth day of November next, at 10 o'clock a. m.

In the Same Matter.

NOVEMBER 26, 1878.

Parties appeared as before. Jason Berry was sworn and examined as a witness, and this matter was adjourned to the twenty-ninth day of November next, at 10 o'clock a. m.

In the Same Matter.

NOVEMBER 29, 1878.

Parties appeared as before, and this matter was adjourned to the second day of December next, at 10 o'clock a. m.

67 At a surrogate's court held in and for the county of Kings, at the surrogate's office, in the city of Brooklyn, on the twenty-sixth day of December, in the year 1878.

Present: Abram H. Dailey, Esq., surrogate.

In the Matter of Proving the Last Will and Testament of ROBERT I. ROBISON, Late of the City of Brooklyn, Deceased.

Satisfactory proof having been made of the due service of the citation issued in this matter requiring the proper persons to appear in this court on the nineteenth day of November, in the year 1878, to attend the probate of the last will and testament of the said Robert I. Robison, deceased, the executrix appeared in person and by Willard Bartlett, Esq., her counsel. Judah B. Voorhees, special guardian, appeared in person. Thos. H. Hubbard, Esq., appeared as counsel for the three corporations named as residuary legatees. Jason Berry, one of the witnesses to said will, was sworn by said surrogate and examined before him; his examination was reduced to writing and filed. Jane S. Robison and David Fairbanks were examined as witnesses, and this court, being satisfied that the said will is genuine, doth adjudge and decree that the said will was duly executed by the said Robert I. Robison, deceased; that the said Robert I. Robison, deceased, at the time he executed the same, was in all respects competent to devise real estate, and not under restraint; that the said will is a valid will of real and personal estate, and that the proofs thereof are sufficient.

And this court doth order that the said will, proofs, and examinations be recorded, and that letters testamentary issue to the executors in said will named, on their taking the oath required by the statute.

A. H. DAILEY, *Surrogate.*

68 STATE OF NEW YORK, } ss:
Kings County, }

I, Jane S. Robison, executrix named in the last will and testament of Robert I. Robison, late of the city of Brooklyn, in Kings county, deceased, being duly sworn, do swear and declare that I reside at No. 197 DeKalb avenue, in the city of Brooklyn, and am over the age of twenty-one years, and that I will well, faithfully, and honestly discharge the duties of executrix of said last will and testament.

JANE S. ROBISON.

Subscribed and sworn this 27th day of December, A. D. 1878, before me.

A. H. DAILEY, *Surrogate.*

The People of the State of New York, by the grace of God, free and independent, to all whom these presents shall come or may concern, send greeting:

Know ye that at the city of Brooklyn, in the county of Kings, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and seventy-eight, before Abram H. Dailey, Esq., surrogate of our said county, the last will and testament of Robert I. Robison, late of the city of Brooklyn, deceased, was proved and is now approved and allowed by us; and the said deceased being at the time of his death an inhabitant of the county of Kings, by reason whereof the proving and registering the said will and the granting administration of all and singular the goods, chattels, and credits of the said deceased, and also the auditing, allowing, and final discharging the account thereof, doth belong unto the surrogate's court of said county, the administration of all and singular
69 the goods, chattels, and credits of said deceased and any way concerning his will is granted unto Jane S. Robison, the executrix in the said will named, she being first duly sworn faithfully and honestly to discharge the duties of such executrix.

In testimony whereof we have caused the seal of office of our said surrogate's court to be hereunto affixed.

Witness Abram H. Dailey, Esquire, surrogate of our said county, at the city of Brooklyn, the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

[L. S.] A. H. DAILEY, *Surrogate.*

Surrogate's Court.

STATE OF NEW YORK, *County of Kings:*

I, Judah B. Voorhees, clerk of the surrogate's court in and for the said county of Kings, do hereby certify that I have compared the

foregoing copy of the record of the proceedings in the probate of the will of Robert I. Robison, late of the city of Brooklyn, deceased, with the original records thereof now remaining in this office, and have found the same to be correct transcripts therefrom, and of the whole of such original records which comprise all the proceedings had thereon; and I further certify that said exemplification would be received in evidence in all the courts of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the surrogate's court this eighteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh.

[L. S.] JUDAH B. VOORHEES,
Clerk of the Surrogate's Court.

70 STATE OF NEW YORK, } ss:
Kings County, }

I, Walter L. Livingston, surrogate of Kings county, and presiding magistrate of the surrogate's court, do hereby certify that Judah B. Voorhees, whose signature is affixed to the foregoing certificate, is clerk of the surrogate's court, and that the foregoing exemplification is attested in due form of law, and that the seal thereto affixed is the seal of said surrogate's court.

Witness my hand and the seal of said surrogate's court this eighteenth day of December, one thousand eight hundred and eighty-two.

[L. S.] WALTER L. LIVINGSTON, *Surrogate.*

Said cause was thence continued from term to term to this term, when it was fully heard and argued by the counsel of the respective parties before Gray and Webb, JJ., and on the twenty-fifth day of June, in the year of our Lord eighteen hundred and eighty four, was entered the following:

Final Decree.

This cause came on to be heard at this term, to wit, on the twenty-fourth day of June, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

That the said complainant is entitled only to the income of the estate of said testator during her natural life.

That the fourth subdivison, so-called, in said bill of complaint of the last will and testament in said bill mentioned is operative and valid, and was so at the time the said last will and testament took effect, and that the defendant corporations acquired, under and by virtue of said fourth subdivision, rights and interests in the estate of said testator, to wit, the right from and after the death of the complainant to the perpetual income of said estate.

That the defendant corporations recover of the complainant their costs of this suit, taxed at the sum of forty-nine $\frac{1}{100}$ dollars, and also the further sum of two hundred dollars for their reasonable expenses necessarily incurred in *in* this suit.

By the court: A. H. DAVIS, *Clerk.*

UNITED STATES OF AMERICA, }
District of Maine, } ss:

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing contains a true and perfect copy of the record and of all proceedings in the cause, Jane S. Robison *v.* The Female Orphan Asylum of Portland *et als.*, determined at the April term of said court, A. D. 1884.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this seventh day of October, A. D. eighteen hundred and eighty-four.

[Seal of the Circuit Court, Maine.]

A. H. DAVIS, *Clerk.*

Endorsed on cover: Maine C. C. U. S. No. 103. Jane S. Robison, individually and as executrix of Robert I. Robison, deceased, appellant, *vs.* The Female Orphan Asylum of Portland, The Portland Widows' Wood Society, and The Home for Aged Women. Filed 15th October, 1884.

DEC 5 1887

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 103.

JANE S. ROBISON, Individually and as Executrix of Robert I. Robison, deceased, Appellant,

vs.

THE FEMALE ORPHAN ASYLUM OF PORTLAND, THE PORTLAND WIDOW'S, WOOD SOCIETY, and THE HOME FOR AGED WOMEN.

APPELLANT'S BRIEF.

ELIHU ROOT.
SAMUEL B. CLARKE,
Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

Supreme Court of the United States.

JANE S. ROBISON, individually and as Executrix of Robert I. Robison, deceased,

Appellant,

AGAINST

THE FEMALE ORPHAN ASYLUM OF PORTLAND, THE PORTLAND WIDOWS WOOD SOCIETY and THE HOME FOR AGED WOMEN,

Respondents.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

Brief of Counsel for Appellant.

The suit is for the construction of a will.

The bill sets out the will in full as follows:

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and publish this my last will and testament. And, first, my will is that my executors see that my body be buried in a decent and proper manner in the family vault in the Eastern Cemetery in the City of

Portland, aforesaid. Secondly, I will all my just debts be paid in full, and from the balance I will that with whatever property may be standing in my wife's, Jane S. Robison's, name, at the time of my death, that my executors make up said amount to the sum of eight thousand and five hundred dollars, it being the amount, or thereabouts, which she received from her father and mother estates, it being my will that the principal shall be kept good to her and her heirs, but not the interest. This is to be in full for all claims she may have on my estate arising out of the use of her property. Thirdly, I further will that she may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. Fourthly, it is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the Widows' Wood Society, and one-third of the income to the Home for Aged Indigent Women, all of the City of Portland and State of Maine. Lastly, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament.

"In testimony whereof, I have hereunto subscribed my name and affixed my seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

(S'd.) ROBERT I. ROBISON [L. S.]

Signed, sealed and declared by the said Robert Ilsley Robison to be his last will and testament in the

presence of us, who, at his request and in his presence, have subscribed our names as witnesses hereto.

CHAS H. ADAMS.
B. F. HARRIS.
JASON BERRY."

The bill alleges that the testator's sisters, Ann Smith and Eleonora Robison died before the death of the testator, the testator's wife, complainant in this suit being still living, and that thereby the gift to the charitable societies in the fourth paragraph of the will became inoperative and that the complainant individually is entitled under the second and third subdivisions of the will to the absolute possession and ownership of all the said testator's estate and not merely to a life interest in the property.

The bill also alleges that controversies have arisen between the complainant, as executrix, and the charitable corporations, defendants in this suit, who claim that they are entitled to the body of the estate after the complainant's death; and it prays a construction of the will and that the trusts reposed in the complainants, as executrix, be declared.

The answers of the defendants admit the death of Robert I. Robison at about the time stated in the complaint (namely, June 13, 1878); the due making and execution of the will, as set forth in the bill; and that the will has been admitted to probate and letters testamentary issued to the complainant, as alleged in the bill. The answers further admit, in substance, that the defendants make claims to the testator's property under the fourth subdivision of the will, substantially as alleged in the bill.

The proofs show that the testator left about $8,000 worth of real property situated in Portland, Maine, and over $15,000 worth of personal property consisting of bonds, shares of stock, promissory notes and accounts

mostly situated in New York City (Record, pages 10–11).

The proofs also show that Ann Smith died September 18, 1876, and Eleonora Robison died September 29, 1863 (*Idem*).

The proofs also show that the testator at the time of his death was a citizen of New York and domiciled in Brooklyn. This is shown by the deposition of Mrs. Robison (pages 13–15), and by the exemplified copy of the record of the probate of the testator's will in the Surrogate's Court of Kings County, New York (pages 16–45). That record shows that the question of the testator's domicile at the time of his death was litigated and decided between this complainant and these defendants before the Surrogate.

The case was tried in the Circuit Court before the Circuit Justice and the District Judge, and a final decree entered adjudging the complainant to be entitled only to the income of the estate during her natural life, and that the defendants, under the fourth subdivision of the will, have the right from and after the death of the complainant to the perpetual income of the estate (page 45).

From this decree the complainant has appealed (page 1).

Assignment of Errors.

1st. The Circuit Court erred in holding that the complainant is entitled only to the income of the testator's estate during her natural life.

2d. The Circuit Court erred in holding that the fourth subdivision so-called in said bill of complaint of the last will and testament in said bill mentioned is operative and valid, and was so at the time the said last will and testament took effect, and that the defendant cor-

porations acquired, under and by virtue of said fourth subdivision, rights and interests in the estate of said testator, to wit, the right from and after the death of the complainant to the perpetual income of said estate.

3d. The Circuit Court erred in holding that the defendant corporations recover of the complainant their costs and expenses of suit.

4th. The Circuit Court erred in that it should have held that at the time said last will and testament took effect the said fourth subdivision of said will was inoperative, and that the defendant corporations acquired, under and by virtue of said will, no rights or interests whatever in the estate of said testator.

5th. The Circuit Court erred in that it should have held that, under and by virtue of the second and third subdivisions of said will, the complainant, at the time said will took effect, became individually entitled to the absolute possession and ownership of all the testator's estate.

6th. The Circuit Court erred in that it should have held that at the time said will took effect, and under and by virtue thereof, the complainant became and is individually entitled to the absolute possession and ownership of all the personalty belonging to said testator's estate.

7th. The Circuit Court erred in that it should have held with reference to the personalty of said testator's estate that the defendants have no right or interest therein whatever, and that the complainant, as executrix, owes no duty to them or either of them in respect thereof.

BRIEF OF THE ARGUMENT.

First Point.

No interests in the testator's property have been acquired by the respondents.

This is clearly so if the provision in the fourth paragraph of the will relative to a division of the income of the estate among the respondents (which is the only mention of or reference to the respondents in the will) is dependent upon the condition expressed in that paragragh of the testator's sisters surviving himself and his wife. For the sisters died before the testator, and the wife is still living. A fulfillment of the condition, therefore, is and has always been, since the will took effect, impossible.

Hence the main question for discussion under this point is whether that provision is so conditioned.

A. The fourth paragraph as a whole is somewhat ungrammatical. Note the words which we italicise: "Fourthly, it is my will *that* if my sister(s), &c., be living at the death of myself and wife, *that* they, &c., shall have the income, &c., as long as they may live, and at their death *to be* divided, &c." Clearly one of the two italicised "*thats*" is superfluous. Clearly, also, "*to be* divided" marks a break in the sentence, and a fresh start with another form of expression. The sentence is capable of being read (omitting the first "*that*"; inserting "*that*" before "at their death," and changing "*to*" in "*to be divided*" to "*it*") as follows: "Fourthly, it is my will, if my sister(s), &c., be living, &c., that they, &c., shall have the income, &c., and that at their death it be divided, &c." So read, there can be no doubt that the condition controls both of the subordinate

clauses, as well the one providing for a division among the respondents as the one providing for the sisters' life interest.

It is possible, however, to omit the second "*that*" instead of the first one. This in form would place the condition in the body of the first subordinate clause. *Would the second subordinate clause thereby be taken from under the control of the condition?* In arriving at this question we have supposed the syntax of the second clause to be amended by changing "*to*" in "*to be divided*" to "*it*," and by inserting "*that*" before "at their death." But this is not very material. The question would be the same if the second clause were left just as the testator wrote it. Such elliptical expressions have occurred in precisely similar sentences in other wills, and it has not been suggested that they raised any doubt as to the meaning (Cattley vs. Vincent, 15 Beav., 198; Doe vs. Watson, 8 How., at p. *271).

It seems hardly doubtful that this question must be answered in the negative. But if there be a doubt, considerations founded upon other parts of the will must be taken into account.

If anything in this will is clear it is that the testators' wife is to have, under the third paragraph, an interest in the property that shall last during her life, *at least;* the only question being whether it shall not last longer. We understand that the respondents do not deny this; at any rate, the Circuit Court held the wife was entitled to the income "during her natural life." Now suppose that the second clause of the fourth paragraph relating to the respondents were unconditioned by what precedes it in that paragraph. We should then have in this will the two following substantive provisions which would have to be construed together and reconciled, viz.: first, a provision that the wife may have the income of all the estate (without specification of the time during which she may have it); and second, a provision that at the death of the testator's sisters the income of

all the estate is to be divided among the respondents. These two provisions can stand together only by supposing that the wife's interest is to be *for the life of the testator's sisters* only; which is a result clearly in conflict with the general intent in favor of the wife manifested by the will.

A possible alternative to this (and the only one, so far as we can see) is to *define* the wife's interest as one for her life and make the division among the respondents take effect upon her death. At this stage of the argument it may not be a sufficient objection to this that it begs the whole question whether the wife's interest is not more than a life interest. But it certainly is a valid objection that this alternative requires a considerable addition to the language of the will. Some such phrase as "*so long as she may live*" must be inserted in the third paragraph, or some such phrase as "*my wife also being dead*" must be inserted in the second clause of the fourth paragraph.

Hence the supposition that the second clause of the fourth paragraph relating to the respondents is not conditioned by what precedes it in the same paragraph leads to one of two conclusions (that the wife's interest lasts no longer than for the life of the testator's sisters, or that considerable additions must be made to the language used by the testator) either of which would appear to be a sufficient reason for rejecting the supposition, and for holding that the contingency of the sisters surviving the wife rules the whole fourth paragraph, as well the second clause as the first.

B. The Court may obtain some assistance in determining this question by looking into the decisions upon provisions in wills substantially similar to this fourth paragraph.

In *Doe vs. Watson*, 8 How., 263, the testator made several devises to his grandchildren, John Parrock and Sarah Parrock, their heirs and assigns, adding:

"Provided always, and the legacies hereinbefore devised to the said John and Sarah, are upon this special condition, that if both my said grandchildren shall happen to die *under age and without any lawful issue*, then it is my will that one-fourth part of all and singular the real and personal estate to them before devised shall go to the monthly meeting of the people called Quakers, and the other three-fourth parts to be equally divided between Sarah Smallwood and others, and to the survivors or survivor as tenants in common forever." Said Sarah Parrock and John Parrock died without issue, but *after they arrived at full age.* The action was ejectment, the lessors of the plaintiff claiming title from the Smallwoods mentioned in the will. The Circuit Court charged the jury that "the devise over to plaintiff's ancestors * * * never took effect by reason of the devisees, * * * John Parrock and Sarah Parrock having both arrived at full age." This Court held this charge to be free from error, and therefore necessarily decided that the concluding clause of the provision of the will above quoted was dependent upon the condition of John Parrock and Sarah Parrock dying "*under age and without lawful issue,*" though the only question discussed appears to be whether "and" in the condition ought not to be changed to "or" so as to read "under age *or* without lawful issue."

In *Cattley vs. Vincent*, 15 Beav., 198, the provision construed was as follows: "I give the residue of my property in the funds, or elsewhere, to be equally divided between my nephew, Robert Vincent, and my niece, Marion Sandon, wife of J. K. Sandon, and also the reversion of above annuities as these shall be, to be divided between my nephew, Robert Vincent, and his sister, my niece, Marion Sandon, and *if Mr. Sandon survives my niece, for him for life, and afterwards to be equally divided between their four children*, which I leave in trust to my nephew, Mr. Vincent; and I also appoint him my executor and residuary legatee." Mr. Sandon

survived the testatrix *but died in the lifetime of his wife*. A suit being brought by a purchaser from one of the four children against the trustee, the question was presented whether the four children took anything under the clause in which they are mentioned or whether their mother took a moiety of the property absolutely. The Court held: "I think that in the event which has happened the children took no interest in the fund. The obvious meaning of the will is that they are only to take if Mr. Sandon survived his wife. The clause is 'if Mr. Sandon survives my niece, for him for life, and afterwards to be equally divided between their four children.' Mr. Sandon, therefore, was not to take unless he survived his wife, and in that case only the property was to be divided between the children."

Jarman on Wills (Randolph & Talcott's Ed., 446,) sums up the results of the decisions as follows: "When a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to ten whole series. The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity and no intention or purpose is expressed with reference to that estate in contradistinction to the others, the whole will be considered to hinge on the same contingency, and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations. Thus when an estate for life is made to depend upon the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them."

C. The remarks of Mr. Justice PUTNAM in Carpenter

vs. Heard, 14 Pick., at p. 457, are appropriate in this case. That learned Judge says (referring at the outset to the opinion of Chief-Justice WILLES in *Fulham vs. Wickett*) : "He lays down this proposition, that there is no book or case in which it is said, 'if the first devise be void, and there be a subsequent devise to another upon a contingency which never happens, that the subsequent devisee shall take the estate, though the contingency never happens, because the first devise is void." He proceeds to show that the devise of Waith to his wife and sisters was upon three contingencies: 1, if a child should happen to be born; 2, if it should die before twenty-one; and 3, if it should die without issue. If those contingencies should happen the devise was to take effect. None of them did happen. No child was born, and the testator had not said what he would have done with the property in that event. It seems to us that any rule contradicting that position of Chief-Justice WILLES must be subversive of the right of disposing of property by will. Nobody questions that right, and nobody doubts that it may be exercised according to the will of the owner, although it may be whimsical, inexpedient or capricious, if the intent be clearly manifested and not inconsistent with the requisitions of the law. To say, therefore, that an estate given to one upon a contingency which does not happen shall vest notwithstanding, is to defeat and not to execute the will. Whether the provision be reasonable or not, is not the question; did or did not the testator intend to have the estate vest absolutely, or only upon the happening of certain events, is the matter to be considered. If the event that happened was not foreseen or provided for, but was a case omitted, then the rule is clear that the heir shall take, for as has been said, the right of the heir is established by law, unless it be clearly taken away by the will. And it is very difficult to see how the heir can be disinherited

by a contingent disposition which never took effect. It is no answer to say, that if the event that has happened had occurred to the mind of the testator, the same reasons which induced him to make the other disposition of the property on the contingencies which have failed, would have induced him to extend it, so as to include the case or event that has happened. This is no answer, because we cannot judicially know it. He might or he might not have done so. But we do judicially know the established right of the heir, and cannot permit him to be disinherited upon conjecture." And again he says (p. 460): "It is not for the Court to question the expediency of the contingency. It is not for the Court to say that the bequest was absolute, when the testator has said it should be contingent; or to say that it should vest, when the contingency has not happened."

Second Point.

The condition of the fourth paragraph of the will having become impossible of fulfillment by the death of both of the testator's sisters before the will took effect, his whole estate is vested absolutely in the appellant individually.

Of course there is no question but that this is so, with reference to the property covered by the second paragraph of the will. The only question is as to the property to which the third and fourth paragraphs relate. Our contention as to this property is that *prima facie* the gift of the income of it to the appellant in the third paragraph carries also the capital absolutely unless there is something in the rest of the will which, fairly construed, shows an intention to make a different

disposition of the capital or to limit the time of its enjoyment; that an adequate meaning can be given naturally to every other part of the will without imputing any such intention to the testator; that therefore the presumption controls and carries the property to the appellant.

A. It is an established principle of construction that a gift of the "income," or of the "rents and profits" of property carries with it the capital from which the income or the rents and profits arise unless other parts of the will show that some other disposition of the capital was intended, and that the duration of the estate in the capital is unlimited unless other parts of the will show a limit, in which case the estate in the capital lasts until the limit is reached.

The rule is thus stated:

By Theobald (on Construction of Wills, p. 243; London, 1876): "The gift of the income of property to a person without more, is a gift of the capital where no other disposition of the capital is made."

By Roper (on Legacies, Vol. 2, p. *1480): "In the preceding subdivisions we have seen that the cases establish the rule of construction that a gift of the interest or produce of a fund without limit as to time amounts to a gift of the capital; but where there are expressions in the will showing an intention to limit the gift of the interest as to time, that limit will be the measure of the gift."

By Sir William Grant (Adamson vs. Armitage, 19 Ves., * 418): "*Prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity, and is consequently a gift of the fund itself unless there is something upon the face of the will to show that there is a different intention."

By Chancellor KENT (Earl vs. Grim, 1 John. Ch.

498–9) : "The interest of the proceeds of the sale of the Beekman street lot is here given to the six legatees, and the survivors of them, without limitation of time. It is an absolute bequest of the interest ; and is the money, then, to be always kept at interest so that the legatees and their representatives may enjoy this interest forever? There is no sufficient reason why this bequest should be limited to the life of each legatee. The better construction is, that this was a bequest, not in joint tenancy, but in common, * * * (survivors meaning such of them as shall be living at the testator's death). * * * May we not apply to this case the rule acknowledged throughout the books, that a devise of the rent and profits of land is a devise of the land itself?" And he does apply it.

By Chancellor Johnson of Maryland (Boyle vs. Parker, 3 Md. Ch., 45) : "But a devise of the profits of the land does not *ex vi termini* pass the land, but only furnishes evidence of the intention of the testator that it shall pass ; and if, upon the face of the will a different intention is manifest that evidence is rebutted."

By the Supreme Court of Ohio (*Collier vs. Grimesey*, 36 Ohio St., 21–22) : "We do not question that a devise of the rents and profits or of the "profits and benefits" of lands, without qualification or limitation, will impliedly carry the fee, but in order to determine whether there is such qualification or limitation we must look into the whole will with the view of ascertaining the sense in which the terms were used by the testator; and when such sense is ascertained, to give it the effect intended. Such terms cannot be held to carry the fee when it appears, from other parts of the will, that the fee is otherwise disposed of."

See also:

Andrews vs. Boyd, 5 Greenleaf, 199.
Earl vs. Rowe, 35 Me., 414.
Sampson vs. Randall, 72 Me., 112.
Mannox vs. Greener, L. R., 14 Eq., 456, 462.
Gulick's Executors vs. Gulick, 25 N. J. Eq., 324, 327–30; S. C., 27 N. J. Eq., 498.

While the rule yields to satisfactory evidence of a different intention, it affords a controlling inference if the rest of the will shows nothing as to what is to become of the capital, or if its provisions are ambiguous and doubtful.

Paterson vs. Ellis, 11 Wend., p. 298, middle.

B. The question therefore is whether there is anything in this will which shows *affirmatively* that the appellant is not to have the capital of the testator's property.

C. The fourth paragraph of the will shows that under a certain contingency the testator intended that the appellant's interest in the property should cease with her life. That contingency has not happened and is now impossible. This paragraph goes no further than to cut down the appellant's interest to a life interest if the contingency happens. It does not cut down her interest absolutely or in all events for the reason that it indicates nothing as to what is to become of the testator's estate in case the contingency does not happen.

Such a provision as we have here, the essential features of which are, (1) a gift; (2) with no express limitation as to time of enjoyment; (3) followed by a provision that, upon a specified contingency, the income of the capital shall go to a third person upon the death of the first taker; and, (4) silence on the part of the testator as to how the property shall be disposed of if the contingency does not happen, has frequently been before the Courts of England and this country for con-

struction; and the decisions have been that where there were no other provisions to be dealt with the first taker and his representatives have the absolute ownership of the capital in case the specified contingency does not happen.

Thus in *Watkins vs. Weston*, 32 Beav., 238, there was a devise to trustees to pay the income of three leaseholds to testator's daughter, and if she died before the leases expired, to accumulate the income for her children. She died childless. *Held* that the absolute property in the leaseholds vested in her, subject to be cut down to a life interest if she had children, and as she had none, her representatives, and not those of the original testator, took the property.

Again in *Jennings vs. Baily*, 17 Beav., 118, it is held that the fact of legacies being given to take effect upon the decease of a person to whom the income of property is given indefinitely, will only cut down the absolute interest to the extent of the legacies.

In *Gulick's Executors vs. Gulick*, 25 N. J. Eq., 324 (S. C. on Appeal, 27 Id., 498), there was a gift of ten thousand dollars to the testator's daughter, Abby Maria, to be invested in the name of his executors and interest paid her free from the control of any man she might marry; "should she marry and have a child or children, then, after her death, I give the said $10,000 to such child or children." Abby Maria died childless and without having married. *Held*, that her executors were entitled to the $10,000, and that it did not fall into her father's residuary estate.

In *Harrison vs. Foreman*, 5 Ves., *207, there was a gift of 40 *l* per annum annuities to Sarah Barnes for her life and after her death to P. and S. in equal moieties; and in case of the decease of either of them in the lifetime of the said Sarah Barnes," the testator gave the whole thereof to the survivor of them living at her decease, Both P. and S. died during the life, time of Sarah Barnes. *Held* that the property went to

the representatives of P. and S. as tenants in common-the contingency upon which the whole property was to vest in one only of them not having happened and therefore the case being as though the grant had been simply and without any contingency to P. and S. In this case the Master of the Rolls, Sir Richard Pepper Arden says: "Then the rule that I applied in *Mackell vs. Winter*, and that was admitted by the Lord Chancellor, takes place; that if there is a clear vested interest the Court is only to see what there is to take it away; and the only contingency is that in case of the decease of either of them in the life of Mrs. Barnes the whole is to go to the survivor. Neither of them was living at her death. That rule therefore that I applied in *Mackell vs. Winter*, and that I still think binding upon a Court of Equity, applies. There is a vested interest; and the contingency upon which it is to be devested never happened. The vested interest therefore remains; as if that contingency had never been annexed to it."

D. The provision of the third paragraph qualifying the gift of the income to the appellant by the statement that she is "*not to have it accumulate for her heirs*" does not rebut the presumption.

Whatever construction is put upon the scope of the gift to the appellant, this provision against accumulation for heirs is probably without legal efficacy. The testator certainly intended that the appellant should "have" the income with the right to "spend" it. This involves an absolute power of disposition with which the provision against accumulation for heirs is inconsistent, as that provision is calculated to touch, not the acts of the appellant in dealing with the income, but the intention with which she may do such acts. Therefore the provision is invalid whether the will gives the appellant the testator's property absolutely or only a life interest therein, just as would be the case if this

provision against accumulation for heirs followed an express gift of all the estate to the appellant to be held, used and enjoyed by her, her heirs, executors, administrators and assigns forever.

Howard vs. Carusi, 109 U. S., 725.

However that may be, the provision indicates nothing as to what disposition is to be made of the capital of the property, and it is an intention on that point which must be found in order to rebut the presumption arising from the gift of the income. Force and effect can be given to the provision against accumulation consistently with an intention on the testator's part that his property is to vest absolutely in his wife. What would have been the meaning of the provision if it had followed an express grant in the most ample terms of all the estate to his wife? Would it not have indicated merely the testator's deliberate judgment that his wife during the rest of her days ought to allow herself all the ease and comfort which the whole income, if spent, would bring; that her saving and frugal habits which had made the accumulation of the property possible ought no longer to dominate her; and that (her children being dead, Record, p. 14), she ought not to stint herself for the sake of collateral relatives? Is there any reason for saying that it means more than this in the actual will? Not that the testator loved the "heirs" less, but that he loved his wife more—this is the key to his meaning. As between them and her he indicates his wishes, but in declaring that *she* shall not have the income accumulated for *them*, he gives no hint as to what is to become of his property when she shall have died and can no longer enjoy it.

In construing this third paragraph of the will an argument against us may possibly be based upon the rule that when the same word is used more than once in a will it is presumptively always used in the same sense. Thus it may be said that the words "the same" and

" it " in the phrase " she having the right to spend the same but not to have it accumulate, &c.," obviously refer to *income* in the immediately preceding phrase; that those words (" the same " and " it ") as used by the testator clearly mean income in the ordinary sense of the word; and that therefore " income " as used in the preceding phrase " she may have the income, &c.," has its ordinary sense and does not include capital. This suggestion is without merit so far as this argument is concerned for the reason that its application to the argument involves a substantial misconception of the foundation upon which the presumption which we invoke rests. That presumption does not rest upon the interpretation of the word " income; " it does not assume that " income " means or can ever mean " capital." Its basis is the fact that there is an express gift of the income and the further fact that no disposition is made of the property from which the income arises. These facts raise the inference that the donee of the income is to have legal title to and ownership of the property which yields the income, and not a mere right to claim the income from some other person who is the owner of the property.

E. There is nothing else in the will which can be supposed to bear against the presumption arising from the gift of the income and the fact that there is no disposition in terms of the body of the estate unless it be the difference in phraseology between the second and third paragraphs.

The second paragraph in the fullest and most unmistakable manner gives a part of the estate, amounting to $8,500, to the wife and her heirs absolutely, while the third paragraph gives her in express terms merely income. The difference is so marked, so sharp, so clear that, considering these two paragraphs alone, it would probably justify the inference of an intent which could only be that, as to the property affected

by the third paragraph, the wife was to have merely the income of it so long as she lived; doubtless, too, this inference would be strong enough to overcome, not merely the presumption which we put forward, but also the presumption that the testator in making a will intended to leave none of his estate undisposed of. But, in determining whether this inference is permissible in this case, the fourth paragraph cannot be ignored. It is, of course, a cardinal rule for the construction of wills that they are to be construed as entireties and not *per parcella*. The fourth paragraph shows that there was to be a contingency under which the wife would have only a life interest. This fact is an adequate reason for expressing the gift in the third paragraph differently from that in the second paragraph. In other words, the inference which might properly be drawn from the second and third paragraphs, considered alone, is neutralized by taking the fourth paragraph into account with them.

F. An obvious inference in favor of our construction of the will is fairly to be drawn from the different ways in which an interest is given to the sisters in the fourth paragraph and to the wife in the third paragraph. The fourth paragraph expressly provides that the sisters (if they survive the wife) shall have the income, &c., "*as long as they may live*," which shows that the testator knew well enough how to mark out precisely a life interest when that was all he intended to give. If his intention in the third paragraph was no broader than the creation of a mere life interest why did he not there too say "*as long as she may live*"?

Third Point.

No implication in favor of the respondents can fairly be made, and, if the Court is not satisfied that the appellant takes more than a life interest in the property, the conclusion must be that there is a partial intestacy.

A. When an implied intention is relied on it is customary to support it by the presumption that a person who makes a will intends to dispose of his whole property and not to be intestate as to any part of it. That presumption is subordinate to another principle. The statutes regulating the transmission of property by will everywhere require that the testator's intention shall be expressed in writing. The writing therefore, is not merely evidentiary; it is of the essence of the matter. And the Courts are wont to say that they must be satisfied not only that the testator intended to dispose of his property, but that he has done it.

B. It is not disputed that under some circumstances an intention may be implied which shall be controlling. But the circumstances under which this is allowable must be so persuasive or cogent that the inference of intention can properly be said to be *unavoidable* or *necessary*.

Thus Roper says (on Legacies, Vol. 2, p. *1471, end): "In the two preceding classes of cases the inference of intention was more or less strong, but because it was not necessary and indubitable the Court would not aid the supposed intention, conceiving it would be assuming the power of making, rather than construing the will. *But where the inference of intention is necessary or unavoidable* that the testator intended the legatee to take on an event not accurately described, the Court will, as we have seen in a preceding section

(p. *1439 *et seq.*), if the event happens, aid the defect by implying the necessary words."

And Lord MANSFIELD says (*Jones vs. Morgan*, App. III., Fearne on Cont. Rem. [589]): "Much has been said at the bar on the meaning of the words *necessary implication*. It is unfortunate when words happen to be made use of in the determination of causes, without a precise, clear, definite idea annexed to them; the great disputes of the world arise upon words. It has been said that a necessary implication must mean, when there is a natural impossibility, that it should be otherwise. There never was such a construction put upon those words. *A necessary implication is that implication arising upon the words the testator has made use of, which clearly satisfies the Court what was his meaning.* It is put in opposition to conjecture. Conjecture is when you suppose what would have been the testator's meaning if he had had the whole case before him; and what, if he had thought of such an event, he would have said upon it: This is a conjecture; but for implication, you must find out his meaning, whether expressed or implied, from his words. If they have an express meaning, and he has made use of inaccurate words, you must construe his words; if they are words of sense, or declarations which are no ways accurate in legal phrase, you must see clearly what is the testator's meaning; and if the testator's meaning is doubtful, if a court of justice cannot say they are satisfied his intention was so, the whole will be void for uncertainty. *Necessary implication, therefore, is that which leaves no room to doubt.*"

C. In this case an implication that the property goes to the respondents requires a finding:

FIRST. That the appellant's interest under the will is for her life only.

SECOND. That the testator did not intend to make the division of his property among the respondents contingent upon the testator's sisters surviving himself and his wife.

Can the Court say that there is, upon the words of this will, "no room to doubt" as to either of these points?

ELIHU ROOT,
SAMUEL B. CLARKE,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

JANE S. ROBISON, Appellant,
v.
THE FEMALE ORPHAN ASYLUM, of Portland,
And Others.

BRIEF FOR RESPONDENTS.

Supreme Court of the United States.

JANE S. ROBISON, Appellant,

v.

THE FEMALE ORPHAN ASYLUM, OF PORTLAND,
THE PORTLAND WIDOWS' WOOD SOCIETY,
AND THE HOME FOR AGED WOMEN.

Brief for Respondents and Appellees.

From the testimony in the case, it appears that Robert I. Robison died in 1878, aged seventy (70) years, — during all his life, until 1863, he lived in Portland, Maine; that in 1863, he closed his business and housekeeping in Portland, — all his property, however, remaining there to the time of his death, except what he carried about with him; that in 1863, he commenced wandering about, visiting various places, staying but a short time in any, stopping at hotels and boarding-houses, never voting, and very careful not to be in any particular place on tax-day; that he visited Portland and the White Mountains every summer; and in June, 1878, on his way to those places, he casually died in Brooklyn; that in 1862, he

made his Will, and thought he had disposed of all his property; providing for his wife during her life, and having no near relatives except two sisters, he gave all his property, upon the death of wife and sisters, to the three best Charities of his native place.

This Will appears to have been probated in Kings County, N. Y., although, as Mr. Robison was neither a citizen nor resident of Brooklyn, it may reasonably be doubted whether the Will was, or could be, honestly and legally probated in Kings County.

The Complainant took possession of all the property, — under the easy laws of New York, gave no security for it; and now asks this Court to declare that she is the *absolute owner* of it.

We apprehend that it is quite evident from the Will itself, that Mr. Robison intended to dispose *definitely* of all his property; and we submit that it is equally evident that, subject to certain legacies, and upon failure of any near relatives, he intended that his property should go to these defendant Societies.

That the intention of a testator, if it can be discovered, is to govern in the construction of a Will, is

too well settled to require words. In Metcalf v. Framingham, 128 Mass. 371, a case not unlike the present in principle, Mr. Chief Justice Gray lays down this doctrine very emphatically, and among other statements says, that in order to carry out the intention of the testator, the Court will "supply any "defect by implication, and so mould the language of "the testator as to carry into effect, as far as possible, "the intention which it is of opinion that he has on "the whole Will sufficiently declared." The substance of it being that the Court will carry out intention of testator, if manifest, although testator did not use the strictly necessary technical words.

We submit that the manifest intention of the testator cannot be defeated by any technicalities.

Sisters died after making of Will, and before testator; and complainant says:

> Devise to defendants was *contingent*, and absolutely *dependent* upon the sisters, or one of them, surviving testator (and his wife), and taking under Will; that fourth clause of Will was but *one legacy* in two parts, and that as both sisters died before testator, *all lapsed.*

If her premises were correct, perhaps her consequences might follow.

But we submit that the legacy to defendant Societies was not contingent on *sisters surviving testator.*

In order to make a legacy contingent, the law requires that testator should *expressly* and *distinctly* declare so; and some writers say that he must go still further, and provide for the non-happening of the contingency.

The words "if," and "at their death," do not make a contingency, but merely indicate when an estate shall take effect in possession.

1 Jarman Wills 807, note 2, and cases.

We would here incidentally remark, that even if complainant's premises and conclusions were sound, we do not at present perceive how she becomes the *absolute owner* of all the estate, and entitled to a decree to that effect.

Testator gave to his wife "the income of all his estate"; and it may be true that an absolute and unqualified devise of the perpetual income of an estate amounts to a devise of the estate itself. But not so whenever there is a devise over of the income after

death of first devisee, or even a manifest intention to devise it over. In that case there is not a devise of *perpetual* income to the first devisee, — it is only a devise of it for life. The legal construction and effect of such devises rest upon the intention of testator; and here it is quite evident that testator intended that his wife should have only the income *for her life.*

We apprehend that devise to respondent Societies was not *contingent* and *dependent.* It is a question of construction and of intent of testator; dependent upon circumstances, and phraseology of whole Will. And here is a manifest intention to dispose of *whole* estate,—to have no lapse of any part. The life estates show an intention to provide against a lapse.

The recent cases go very strongly against allowing the lapse of a legacy, where there is fair ground for determining in what direction the estate is appointed to go, by terms of Will, in the event of the decease of the legatee.

2 Redfield on Wills (2d Ed.), Section 8, 7, &c., and cases cited.

A simple legacy to A will lapse by his death, during life of testator; but a legacy over after death of A will prevent a lapse.

Even where a bequest depends upon an intervening estate under a Will, and is thus made to take effect

only at the termination of the prior estate; and the prior estate lapses by the death of the legatee, during life of testator, this will not defeat the estate over.

2 Redfield Wills (2d Ed.), Section 8, 23, and cases cited.

Prescott v. Prescott, 7 Mete. 141.

Even if legacy to defendant Societies be connected with legacy to sisters, a lapse of latter will not cause a lapse of former: especially where it is manifest intention of testator that former should not lapse.

1 Redfield, Wills (3d Ed.), Ch. 10, § 41, 20, &c.
2 Redfield, Wills (2d Ed.), Ch. 1, § 8, 7.

Estate *vested* in defendant Societies on testator's death.

This was a *conditional limitation*,—and not a condition precedent; and bequest to sisters being defeated, the limitation over to defendants takes effect.

The only *contingency* to be found in the Will affects but the interest of the sisters, — is restricted to that estate.

Subject discussed, and many cases cited in
1 Jarman Wills (5th Ed.), 830, &c.

The principal case upon which complainant is understood to rely, is Carpenter v. Heard, 14 Pick. 449. The facts of that case are very unlike those at bar; and so far as the law there laid down has any applicability to this case, it would seem only to settle that the legacy to testator's sisters lapsed by their death in the life-time of testator. This we have no occasion to question.

The Revised Statute of New York, upon which the Complainant is understood to lean, — even if applicable, is no obstacle to the defendants taking —

both sisters died *before testator*,

and consequently

ownership was suspended for only *one life* (that of his wife), "in being *at the death of the testator*."

JOHN RAND,

Counsel for Respondents.